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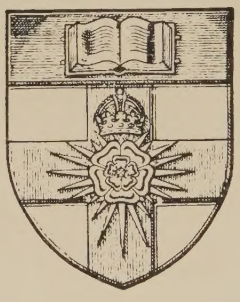

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AND ON APPEAL THEREFROM IN THE

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1894.

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OF

THE COURT OF APPEAL.

1894.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1893. 1894.

[IN THE COURT OF APPEAL.]

THE BEDOUIN.

C. A.
1893
Nov. 15.

Admiralty—Marine Insurance—Charterparty—Chartered Freight—Perils of the Sea—Delay through Breakdown of Machinery—Causa proxima—Non-communication of material Fact.

By a charterparty the charterer agreed to pay the plaintiffs so much monthly in advance for the hire of their vessel, for the space of one voyage to South America and back to Europe, provided that "in the event of loss of time by . . . . breakdown of engines or machinery . . . . and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

By a slip initialled by the defendant the risk to be covered by insurance was described as "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered on board or not on board" for three months, "one-third diminishing each month."

By a policy executed in accordance with the slip the perils against which the defendant undertook to indemnify the plaintiffs were "of the seas," &c., in the usual form.

The plaintiffs' vessel sailed under the above charter, and before the three months expired, owing to the thrust-shaft parting, she had to be towed into

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St. Vincent. Payment of hire consequently ceased during the twenty-eight days' delay caused by the accident.

In an action brought by the plaintiffs on the policy to recover the amount so lost, Gorell Barnes, J., found as a fact that the damage to the thrust-shaft was caused by sea perils, and:—

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), affirming the decision of Gorell Barnes, J., that the defendant was liable, as (following and approving *The Alps* [1893] P. 109) the clause in the charter-party was put into operation through the immediate action of the perils insured against; secondly, that though the plaintiffs might ultimately earn the whole amount of freight, the loss due to the postponement through the delay fell on the policy; thirdly, that though the defendant was not told at the time of initialling the slip, that he was insuring freight under a time charter, containing the twenty-four hours' clause, this did not amount to non-communication of a material fact, as this cesser clause is practically universal in a time charter, and the description on the slip, "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered," coupled with the clause "one-third diminishing each month," was sufficient to give the defendant notice of the nature of the risk.

APPEAL by the defendant, Robert Bradford, an underwriter at Lloyd's, against a decision of Gorell Barnes, J., dated June 21, 1893, holding the defendant liable in an action by the plaintiffs, the Bedouin Steam Navigation Company, Limited, to recover the sum of 12*l.* 8*s.* 7*d.*, being the amount applicable to the defendant's subscription of 40*l.* upon a policy for 1500*l.* on chartered freight.

The facts were shortly that:—

On July 26, 1889, the plaintiffs' screw steamship *Bedouin* was chartered from August 7, by the Compagnie Maritime du Pacifique of Havre, for "the space of one voyage to South America and back to a port in Europe not north of Hamburg," freight to be "at and after the rate of 955*l.* 10*s.* per calendar month, and at and after the same rate for any part of a month, and to be paid monthly in advance," and "in the event of loss of time by deficiency of men, want of stores, breakdown of engines or machinery, or other cause appertaining to the owners, and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

On August 9, the plaintiffs, through their brokers in London, insured the freight per *Bedouin*.

The material portion of the slip initialled by the defendant and other underwriters ran as follows: "3 months @ sailing

probably 11th inst. Freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered—on board or not on board—full interest admitted—$\frac{1}{3}^{\text{rd}}$ diminishing each month."

A policy dated August 15 was drawn in accordance with the slip, the insurance being described as "for and during the space of three calendar months, commencing 11th day of August 1889, and ending 10th day of November 1889, both days inclusive" on "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered on board or not on board, premium 15*s.* per cent." In the margin there was a clause "$\frac{1}{3}^{\text{rd}}$ diminishing each month," and the perils insured against were "of the seas," &c., in the usual form.

On August 11, 1889, the *Bedouin* sailed with a general cargo, under the above charterparty from Liverpool for ports on the West Coast of South America viâ Havre and Bordeaux.

On August 23, having called at the latter ports and shipped further cargo, she proceeded on her voyage, experiencing a high swell, and subsequently a high sea on the starboard bow, causing the vessel to pitch heavily at times, and the engines to race, whilst the after crank-pins, main and thrust bearings were found to be running warm.

On September 2, the vessel was brought to an anchor in St. Vincent Harbour, and the thrust bearings were then examined, but no cause for the heating could be found. On the 3rd the vessel, having coaled, left the harbour. On the 5th, in fine clear weather, with a smooth sea, the thrust-shaft was found to be badly gone at the after-side of the first collar, and shortly afterwards the shaft parted.

On the 8th the master of the *Bedouin* made an agreement with a passing steamer to tow him back to St. Vincent, where the vessel was safely anchored on the 11th, and a new shaft having been sent out there and fitted, the *Bedouin*, after a delay of twenty-eight days, during which payment of hire ceased, left on October 3, and delivered her cargo at the various ports of destination on the west coast of South America.

June 20, 21. The case was tried on a written statement of facts to which was annexed the charterparty, slip, policy and average statement, but the parties agreed that evidence might be called by the defendant on the following points, viz., that the terms o

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the slip did not give him information that he was insuring hire payable under a time charter—that the fact that the proposed subject-matter of insurance was of this nature would materially influence an underwriter in accepting the risk, and—that the ordinary rate for a hire risk is largely in excess of that charged for a freight risk.

The effect of this evidence is stated in the judgment of Gorell Barnes, J.

It was admitted by the plaintiffs that the defendant was not actually informed at the time of initialling the slip that the hire was payable under a time charter, but it was contended that as the slip contained the diminishing clause above set out, the nature of the risk was sufficiently indicated.

Joseph Walton, Q.C., for the plaintiffs. So far as regards the liability of the defendant for loss of hire, the case is covered by *The Alps.* (1)

[He was stopped by the Court.]

Cohen, Q.C., and *Hurst*, for the defendant. There was no loss by perils insured against as the loss (if any) was due to delay causing the ship to remain idle, and was not proximately caused by a peril of the sea. The defendant does not say that the ship was unseaworthy, or that the shaft was not a fit one, but the contention is that there is no evidence that the breakdown was due to a peril of the sea, for the language of the log and surveys will not bring the loss within the expression " perils of the sea " as defined in *Thames and Mersey Marine Insurance Co.* v. *Hamilton.* (2)

The underwriter only indemnifies the assured against such losses as are caused by the direct and violent operation of the perils insured against, and not against loss by the ordinary wear and tear of the voyage: Arnould on Marine Insurance, 6th ed., p. 720, citing *Covington* v. *Roberts.* (3) There was no such extraordinary weather as to make the accident to the shaft a loss by perils of the sea.

Secondly, no part of the chartered freight was lost, as the shipowner would ultimately earn his whole freight, and therefore

(1) [1893] P. 109. (2) 12 App. Cas. 484.
(3) 2 B. & P. (N.R.) 378.

until the voyage was performed no liability on the policy could arise. In *Stewart* v. *Steele* (1) it is suggested in argument (2) that, "The underwriters are liable upon their contract of indemnity the moment a partial loss is sustained, even though the damage has not actually been repaired;" but Maule, J., says (3), "not until the voyage or the period of insurance is at an end."

Thirdly, on the evidence, it must be taken that it was not the intention of the defendant to insure such a special risk as the cesser of hire through the breakdown of the machinery of the *Bedouin*, and it is submitted that the low premium strongly corroborates this view. The defendant treated the insurance as that of an ordinary voyage charter. To indicate this class of risk, there would have been some such words as "diminishing daily," and not "one-third diminishing each month," which only indicates that in respect of total loss of freight the liability of the underwriter is running off per month.

In the case of *The Alps* (4) it must be assumed that the underwriter knew that it was a time charter; but there was nothing on this slip to shew that the risk covered was a time charter with a twenty-four hours' clause in it. It may be true that this class of risk, including the twenty-four hours' clause, is the constant subject of insurance; but the defendant was entitled to have every material fact within the knowledge of the plaintiff communicated, even though the defendant, if he had given sufficient consideration to the subject, might have brought to his mind the material fact not communicated: *Bates* v. *Hewitt* (5), and this non-communication was the concealment of a material fact which vitiated the policy: *Tate* v. *Hyslop.* (6)

[The following cases were referred to: *Potter* v. *Rankin* (7); *Harrower* v. *Hutchinson.* (8)]

Joseph Walton, Q.C., in reply. As to the first point, that this was not a loss by perils of the sea, it is evident from the statements in the log that the engines raced a good deal owing to

(1) 5 Scott, N. R. 927.
(2) 5 Scott, N. R. at p. 942.
(3) 5 Scott, N. R. at p. 943.
(4) [1893] P. 109.
(5) Law Rep. 2 Q. B. 595.
(6) 15 Q. B. D. 368.
(7) Law Rep. 6 H. L. 83.
(8) Law Rep. 5 Q. B. 584.

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the pitching of the vessel, and the report of the surveyor is to the effect that "the fractured parts of the shaft showed no signs of any flaw or inherent defect, and that the breakage must have been caused by some undue strain experienced not more than a few days previous to the actual breakage."

As to the second point, that the freight was not lost, it is no answer to the claim to say that freight could be earned afterwards when the plaintiffs were no longer covered. The insurance was for three months, and during that period the loss of freight occurred.

As to the third point, that there was concealment, the evidence given on behalf of the defendant only goes to shew that until the decision in *The Alps* (1) it was not known that such a claim as this was recoverable, the view of underwriters being that a risk of this nature was not covered. That is, however, a question of the true construction of the policy as matter of law, and not a question of concealment.

If an underwriter wishes to exonerate himself from liability for any claim consequent upon loss of time, however arising, he can do so by the insertion of the well-known warranty clause, the form of which is given in McArthurs' Contract of Marine Insurance, 2nd edit., p. 328.

GORELL BARNES, J. [After stating the nature of the case and summarising the contents of the charterparty, the slip, and the policy, the learned judge continued:] The owners of the *Bedouin* appear to have had under the cesser clause of hire a deduction, or loss, by non-payment from the charterers of the hire during the time that the vessel was not in an efficient state to resume her voyage, and it is in respect of that loss that the present claim on the policy arises.

The case of *The Alps* (1) fully deals with the principle which I adhere to in this case, viz., that if the clause in the charterparty is put into operation through the immediate action of perils insured against, then, apart from other points raised, the underwriter is liable.

In the present case three points are taken on the part of the

(1) [1893] P. 109.

underwriter by which it is sought to distinguish this case from that of *The Alps*. (1) The first is that the loss was not a loss caused by perils of the sea. This turns upon a question of fact, and the point when it is accurately stated comes to this: that the damage to the propeller shaft was not caused by sea perils. Counsel for the defendant practically admit that if the damage to the propeller shaft was caused by sea perils, the result follows that there must be the delay and the consequent loss of freight, just as there was in the case of *The Alps* (1), where fire caused the delay. But it is said that there is no trace here of violent storms or hurricanes, and that, unless that is so, it cannot be inferred that the propeller was broken by anything which amounted to a sea peril. With regard to that point, it appears to me that I must take the facts as stated by the parties, coupled with those documents which I have liberty to refer to, viz., the log-book and surveys. I have looked at them, and having regard to the admission made in this case that the shaft was a fit one, that the ship was seaworthy, and to the fact that the record of the weather speaks of high seas, and so forth, the inference which I draw is that the shaft was broken by an undue strain put upon it by the weather; that is to say, that the breakage was an extraordinary occurrence.

Without referring to all the definitions that have been given of "perils of the sea," I may refer to that of Lord Bramwell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (2). He says (3): "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance" would be a peril of the sea, and he adopts the definition of Lopes, L.J., in *Pandorf* v. *Hamilton* (4), that "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody" is damage from perils of the sea.

The inference of fact which I draw is, that this was a breakage due to a peril of the sea, and therefore the clause in question was

(1) [1893] P. 109.
(2) 12 App. Cas. 484.
(3) 12 App. Cas. at p. 492.
(4) 16 Q. B. D. 629, at p. 633.

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put into operation through the immediate action of the perils insured against.

The second point is, that although the hire was suspended by a breakdown of the machinery through a sea peril, yet there is no loss falling on the policy, because all that happened was to postpone the earning of the charterer's money to a later date, and that the shipowner ultimately got, under the charter, the whole freight, just as if there had been no delay.

I think that is an ingenious point, started probably by the counsel who argued it, and one which it is difficult to follow. As a matter of fact the shipowner does not get the freight during a particular period. He does not get his money at the time he ought to get it, and his ship takes longer to earn the amount of freight which she has to earn for him.

It appears to me, therefore, that the loss occurs then and there, and that it is one which falls on the policy, by which an insurance is effected against the freight during the time the policy runs.

I cannot help thinking that the real point intended to be raised is that of so-called concealment. That is a matter of some difficulty. According to the statement of facts, I think it must be taken to amount to a plea in the old form that the defendants were induced to subscribe the policy by concealment of a material fact by the plaintiffs or their agents. The material fact stated is that they were not told that they were being asked to insure a time charter, although the argument before me has been that they were not told that they were to insure a time charter which had a clause in it which we have here called "the twenty-four hours' clause."

The question then is, whether or not, under the circumstances, there has been a concealment of a material fact? Some evidence has been called on behalf of the defendant, and none has been called for the plaintiffs—they have relied on the legal position of the matter. I think that, after hearing the evidence on the part of the defendant, and after looking at the documents, and especially referring to the clause "one-third diminishing each month," which is in connection with a risk described as "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered," there can be no doubt that the

underwriters were well aware that at the time when this policy was being put forward they were liable to insure a time charter risk, and I find that the underwriters in the witness-box here have said that they did not care whether it was a time charter or a voyage charter; but they say, "We did not know, and you did not tell us, that in insuring this time charter we were taking upon ourselves the responsibility of a clause involving a loss of hire if it should come into operation."

If the clause had not been a known clause, or had been an unusual clause, there would have been a good deal of substance in that contention; but it has been proved by the witnesses, and has been practically admitted throughout the argument, that this is an universal clause in a time charter, and it seems to me that when an underwriter takes upon himself the insurance of the freight which should accrue under a time charter with such a clause in it, he takes upon himself the risk of whatever responsibility is cast upon him by the policy attaching to such freight under such a charter, in accordance with what is said in the judgment in *Inman Steamship Co.* v. *Bischoff* (1), and I think the argument of the counsel for the plaintiffs is sound, that what the under-writer complains of as having been concealed is not a fact, but a view of the law, and that can hardly be stated as a matter of concealment.

To put the case in a short form, it appears to me that where the underwriter insures and has notice that he is insuring chartered freight which will cover time charter freight by such a slip and policy as this, and knows that a time charter has an universal or common clause in it which may impose a liability upon him, he takes his chance of what that liability may be.

I do not think that this case is analogous to *Tate* v. *Hyslop* (2), where, having regard to the practice of underwriters and to the reasoning of the judges upon the peculiar facts of the case, there was no doubt a concealment of what the jury found to be a material fact. I do not think that, in the present case, there is any evidence that the plaintiffs had any knowledge that a different rate would have been asked if they had called attention specifically to the clause in question.

(1) 7 App. Cas. 670, at p. 678. (2) 15 Q. B. D. 368.

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For these reasons I think the plaintiffs are entitled to succeed, and I give judgment for them with costs. I also certify that this was a proper action to be brought in a superior Court.

On appeal:—

November 15. *Cohen, Q.C.*, and *Hurst*, for the appellant (defendant), argued as in the Court below, but did not contest the finding of Gorell Barnes, J., that the breaking of the shaft was due to sea perils, and on an intimation from the members of the Court of Appeal that the second point was not tenable, viz. that there was no loss as the plaintiffs, the shipowners, could ultimately earn their whole freight, this portion of the argument was not pressed. The cases of *Mackenzie* v. *Whitworth* (1), and *McSwiney* v. *Royal Exchange Assurance* (2), were referred to.

Joseph Walton, Q.C., for the respondents (plaintiffs), was not called upon.

LORD ESHER, M.R. This is an action on a policy of insurance on freight. What is the freight in this case which is said to be the subject-matter of this insurance? It is not denied that it was chartered freight; and what was the charter? It was a charter of the ship on a voyage from Liverpool to the West Coast of South America, and back to Europe. That is a long voyage, but the freight was payable monthly in advance; that is, the freight by this charterparty was payable before it would otherwise be payable. If goods are shipped on board a vessel without any such terms no freight whatever is due until the arrival of the ship at the port of discharge, and till the goods are delivered. Therefore freight in advance can only be by means of contract, which is by the charterparty. It is advance freight and it is payable monthly.

If that remains so and the ship comes into a port of distress by reason of the perils of the sea, the shipowner is not liable for injury done to the charterer by perils of the sea, and therefore the charterer would be bound, if the ship was kept for a month in the port of distress, to pay for that month; but the charterer, who takes a ship on these terms, wishes to throw off that liability,

(1) 1 Exch. D. 36. (2) 14 Q. B. 634; 19 L. J. (Q.B.) 222.

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which is to pay a very large sum indeed for the ship at a time when, by perils of the sea, he cannot have the use of the ship, and the ship is in the hands of the shipowner, for the shipowner is bound to repair the ship. Therefore he desires to get rid of that, and he does so by what is called the twenty-four hours' clause. If it were not for that clause the charterer would have to be paying freight for a time when he could not get any benefit from the use of the ship, that benefit being taken from him by a peril of the sea.

To my mind, if it were so he could insure that freight; that is, insure against that loss of freight which he is bound to pay for. But he has shifted it on to the shipowner, who by the clause in the charterparty would lose that freight to which, but for the peril of the sea, if it can be held to be the proximate cause of the loss, he would have been entitled.

The case of *The Alps* (1) really decided that such a loss of freight by the shipowner in consequence of such a twenty-four hours' clause in the charterparty could be recovered from the underwriters where it was brought about by the direct peril of the sea: that is, where it is sufficiently proximate. To my mind that case is right. If it is not a proximate cause neither party could insure it, and there would be this state of things—that either the charterer must lose a large sum of money, or the shipowner must lose it, really in consequence of a peril of the sea.

It seems to me in the case of *The Alps* (1) that that was sufficiently proximate, and therefore the loss of the shipowner by reason of the twenty-four hours' clause being brought into play by the peril of the sea as the proximate cause is an insurable interest. That being so, in what terms must a policy of insurance cover such a loss? It may cover it by saying that it is an insurance on freight. That is the second point decided in the case of *The Alps*. (1) It is a loss of freight caused immediately by the peril of the sea, and therefore insurance of freight is sufficient to cover it. The case of *The Alps* (1) was really decided upon the dicta, if you are pleased to call it so, of Lord Selborne and Lord Watson in the House of Lords (2), which described the

(1) [1893] P. 109.

(2) *Inman Steamship Company* v. *Bischoff*, 7 App. Cas. 670, at pp. 675, 690.

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very case which occurred afterwards in the case of *The Alps* (1), and said in such a case it was an insurable interest, and so coverable by a policy of insurance. If that be so, you have here a charterparty; you have the twenty-four hours' clause in it; you have the loss brought about by the peril of the sea acting immediately upon that clause. Here was an insurable interest, an insurable loss, and the words of the policy are large enough to cover it. That drives counsel for the appellant to admit that there is no defence on the part of the underwriter unless there was the concealment of a material fact.

The assured is not bound to tell the underwriter what the law is. He is bound to tell him, not every fact, but the material facts; and his other obligation is this, that if he is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely, with intent to deceive, though it may not be a material fact, it will vitiate the policy. The underwriter has his right to have his questions truly answered; but that does not arise in this case. The only question is, whether those who effected this insurance concealed a material fact from the underwriters at the time the policy was effected. It is clear that the duty of those who effected the insurance for the assured was to lay this slip before the underwriters. They said nothing. That induces the question, does the slip conceal a material fact? In other words, is there a material fact which ought to have been in this slip and which is not? Now, what is a material fact here? It is a material fact for the underwriter to know whether he is insuring against a loss by the twenty-four hours' clause, but it does not follow from that, that it is a fact which the assured is bound to tell him, for let us see what this slip does tell him. Does it, or does it not, tell him first of all, that he is asked to effect a policy on chartered freight? He is asked to insure for three months after sailing "freight chartered, $\frac{\text{and}}{\text{or}}$ as if chartered, on board or not on board."

It cannot mean freight on board or not on board, because freight is never on board. Freight is the charge made by the shipowner for the carriage of goods on board his ship, and there-

(1) [1893] P. 109.

fore these words, "on board or not on board," are a short way of saying you are asked to insure chartered freight, or, as if chartered, on goods on board or not on board. But if there were any difficulty at all in construing the words "$\frac{\text{and}}{\text{or}}$ as if chartered," it seems to me that these words "on board or not on board" do conclusively shew it must be chartered freight; because, if there is no charter, or no contract equivalent to a charter, there cannot be freight payable on goods not on board. If there is no contract making the freight payable with goods not on board, there is no freight due unless goods are on board and are carried to their destination. It follows, therefore, that these words informed him that he was asked to insure chartered freight. What chartered freight? You have it now on goods whether on board or not, "one-third diminishing each month." That is, in other words, to tell him it is chartered freight payable for each month, diminishing in amount one-third each month. Therefore, it tells him it is freight payable per month. Is that a time charter on freight? Is it a charter on freight payable according to time, and not according to voyage or delivery? To my mind it is quite clear that it is. It follows then, from the first part of the slip, that it is chartered freight; from the second part, that it is freight payable per month, whether the goods are on board or not, and that it is freight payable according to the month, one-third diminishing each month. Therefore, it told him it was a time policy with regard to the freight. Then, what is the evidence? That in these days, wherever there is a charterparty which is a time charter with regard to the freight, the difficulty has been seen about these perils of the sea and the ship putting into a port of distress; and, therefore, in every such charterparty, or in next to every one, there is the twenty-four hours' clause.

When those who effected the insurance, therefore, told him that this was to be a policy on chartered freight, on freight payable per month, they told him in effect further, that it was a policy with the twenty-four hours' clause in it. Therefore, so far from concealing anything from him which they were bound to tell him, they told him in fact, by the slip, the exact state of things.

In these circumstances it cannot possibly be said that there was any concealment of a material fact. There was no defence

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to the action; and so far as this can be said to be a decision based upon *The Alps* (1), I agree with the decision in that case, and with all parts of it. This is a stronger case, and goes beyond it. I see no ground for the appeal, and therefore it must be dismissed with costs.

LOPES, L.J. The *Inman Steamship Co.* v. *Bischoff* (2) and *The Alps* (1) established that loss of freight, such as the freight in the present case, if brought about by perils of the sea, is an insurable interest, and is covered by a policy of insurance on freight such as the policy in the present case. That being so, what is the defendant's defence to this action? His defence is that a material fact known to the plaintiffs has not been communicated to him. The proof rests on him. It is a question which he has to establish, and the point we have to consider is whether that is made out.

The learned judge has come to the conclusion that it was not made out, and I entirely agree with him. The slip conveys to the mind of the defendant, in the first place, that the freight to be insured is chartered freight. But there are other material words on the slip—"one-third diminishing each month." That ought to convey to the mind of the defendant that it is not only chartered freight, but time charter freight.

Now we come to the evidence given by the defendant. There was none given by the plaintiffs. What the defendant and his witnesses said in point of fact was, that in all cases where it was chartered freight and time charter freight, it was the invariable practice for charterparties to contain this twenty-four hours' clause. If that was so, so far from there being any concealment of a material fact, it was exactly the contrary. Therefore the learned judge was right, and this appeal fails.

KAY, L.J. I concur.

Appeal dismissed.

Solicitors for appellant (defendant): *Pritchard & Sons.*

Solicitors for respondents (plaintiffs): *Field, Roscoe & Co., for Bateson, Warr, & Bateson, Liverpool.*

(1) [1893] P. 109. (2) 7 App. Cas. 670.

T. L. M.

[IN THE CONSISTORY COURT OF CHESTER.]

1893
Oct. 26.

EGERTON *v.* ALL OF ODD RODE.

Faculty—Memorial Inscription in Parish Church—Prayers for the Dead—Twenty-Second Article of Religion—Discretion of Ordinary.

An application was made to the Consistory Court of Chester to authorize by faculty the erection in a parish church in the diocese of Chester of a stained glass memorial window, having placed below it an inscription in Latin, the translation of a portion of which was as follows: "Of your charity pray for the soul of H. F. . . . deceased . . . . and for the soul of J. H. C. . . . deceased":—

Held, that the Ordinary ought not in his discretion to sanction the introduction into the church of any inscription of which the above words would form part, and that so much of the application as prayed that a faculty might be granted for placing such words beneath the proposed window must be rejected.

Breeks v. *Woolfrey* (1 Curt. 880) discussed.

THIS was a cause of faculty promoted by the Rev. John Majoribanks Egerton, rector of the rectory and parish church of All Saints, Odd Rode, in the diocese of Chester, for the purpose of obtaining a faculty authorizing the erection of stained glass (1) in a two-light window in the south aisle of the above church and the placing of a brass beneath the said window with memorial inscription thereon; according to the particulars of the said glass window deposited in the registry of the Court.

The usual citation with intimation issued on September 14 last, but no appearance was entered in the suit, and on September 28 last the design of the window proposed to be erected was approved by the Court. On the same day a memorial was brought in representing that the inscription it was desired to inscribe beneath the proposed window was the following—"De caritate tua ora pro anima Henriettæ Franciscæ viduæ Georgii Hamerton Crump de Chorlton Hall in hoc comitatu mortua die XXIII. Augusti A.D. MDCCCXCII. ætatis suæ LXXV. Et pro anima Johannis Hamerton Crump supradictorum filii majoris mortui die II. Martii A.D. MDCCCLXXXVII. ætatis suæ XXXIII."

(1) Described in the citation as representing "The Holy Child, The Blessed Virgin Mary and Saint Joseph journeying into Egypt, and the Carpenter's shop at Nazareth."

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The cause was now heard before the Chancellor of the diocese of Chester (the Rev. Thomas Espinell Espin, D.C.L.).

It appeared that the proposed glass window was intended as a memorial to the two deceased persons named in the inscription brought in, and that the expense of the same would be defrayed by their family.

The solicitor for the promovent prayed that the faculty should issue for the erection of the proposed window, according to the design approved by the Court with the Latin inscription, a copy of which is above set out, placed on a brass beneath it.

The Court intimated that a faculty would be issued for the erection of the stained glass window according to the approved design, but with regard to the inscription brought in on September 28, last, delivered the following judgment.

THE CHANCELLOR. It may be worth while, since I have had to give attention to the whole subject of this case, to make some remarks on it which may be useful on future occasions. When the proposed inscription was brought before the Court on September 28 last, I referred to the well-known case of *The Office of the Judge promoted by Breeks* v. *Woolfrey* (1), and did so on the spur of the moment, not having seen the proposed inscription until just before the Court opened. But on consideration it may be doubted whether that case and the judgment in it would have warranted the Court in sanctioning the proposed inscription being placed in the Church of All Saints at Odd Rode. The case of *Breeks* v. *Woolfrey* (1) is a leading case, and the judgment in it is a considered judgment delivered by Sir Herbert Jenner Fust. But then he did not directly sanction the inscription before him, he only refused to order the tombstone which bore it to be removed. It does not appear that he would himself have authorized the inscription if he had been asked to do so.

Then again it might be argued that the proposed Latin inscription in this case, the translation of the portion of which material to the present question is as follows: "Of your charity pray for the soul of H . . . . F . . . . , widow of George

(1) 1 Curt. 880.

Hamerton Crump, of Chorlton Hall in this county, deceased. . . . and for the soul of John Hamerton Crump, ... son of the above, deceased. . . . " goes somewhat beyond the inscription placed on the tomb of Mr. Woolfrey in the churchyard of Carisbrooke. So far as material the latter ran thus:—

" Spes mea Christus
Pray for the soul of J. Woolfrey
It is a holy and wholesome thought to pray for the dead.
2 Macabees xii. 46. . . ."

It might reasonably be said perhaps that in principle the proposed inscription in this case does not differ from the inscription in *Breeks* v. *Woolfrey*. (1) Still the one submitted to this Court does seem to go beyond the one which in *Breeks* v. *Woolfrey* (1) the Dean of Arches refused to displace, and this Court ought in my opinion to govern itself in such a matter somewhat strictly by the decisions and precedents furnished by the Court of Arches. One or two interesting topics arise out of the judgment delivered in 1838 by the Dean of Arches in the case I have referred to. The inscription there was objected to on the ground that it was contrary to the doctrine and discipline of the Church of England, and in particular to the Twenty-second Article of Religion which declares that, " The Romish doctrine concerning purgatory, pardons, worshipping and adoration as well of images as of relics, and also invocation of Saints, is a fond thing vainly invented and grounded on no warranty of Scripture but rather repugnant to the word of God." It was on this Twenty-second Article and its force that the decision really turned. Is prayer for the dead involved in the doctrine concerning purgatory? That was the sum and substance of the controversy. The learned judge ruled clearly and decisively that prayer for the dead does not fall under the same condemnation as the Romish doctrine concerning purgatory. His reason was that prayer for the dead is a practice of much earlier date than the introduction of the doctrine of purgatory, and he points out that such prayers are to be found in the first Prayer Book of King Edward VI., where they appear in very noble words in the Communion Service, in its very heart

(1) 1 Curt. 880.

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and centre, the Prayer of Consecration, and this Prayer Book is declared by the Act of Uniformity (1) which established the second Prayer Book of King Edward VI., in 1553, to have been "a very godly order . . . . agreeable to the word of God and the primitive Church, very comfortable to all good people. . . ." Nevertheless, since doubts and mistakes had arisen, as the last-mentioned Act tells us, the authorities had the Prayer Book of 1549 "faithfully and fully perused, explained and made fully perfect." The result was the second Prayer Book of 1553 from which prayer for the dead was altogether omitted. The main reason why this was done was that Roman controversialists took advantage of such prayers as an argument to support their own doctrine of purgatory, although the two things are very plainly distinct. However there was, as the learned judge said, no express prohibition of such prayers, and they certainly could not be held to constitute a violation of the Twenty-second Article of Religion. On the whole therefore he concluded that the Church of England discourages such prayers, but does not prohibit them.

There is one argument which the learned judge does not notice, but which very strikingly corroborates the conclusion at which he arrived. In the earliest draft of the Twenty-second Article of Religion, on which article the decision of Sir Herbert Jenner Fust turned, prayer for the dead was mentioned, along with purgatory and pardons, and condemned along with them as unscriptural; and Bishop Hooper, the most advanced of our Reformers, actually circulated the Article with this addition in the diocese of Worcester. His version of the Article ran thus: "The doctrine of the schoolmen of purgatory, pardons, prayers for them that are departed out of this world, &c., is a fond thing vainly invented," &c. But when the code, which then contained forty-two Articles, was submitted in 1553 for final approval to Convocation, this particular clause about prayers for the dead was erased. I subjoin some words of the Very Rev. Herbert Mortimer Luckock, the present learned Dean of Lichfield, in reference to this significant erasure. The passage to which I would refer is as follows: "It shews as clearly as possible that the matter was

(1) 5 & 6 Edw. VI. c. i.

brought under consideration, and that, even at a crisis when the authorities of the English Church manifested more disregard for Catholic principles than perhaps at any other time, they nevertheless found it quite impossible to stigmatize prayers for the dead as contrary to Scripture." ("The Intermediate State between Death and Judgment," p. 215.) Sir Herbert Jenner Fust evidently attached importance to a tombstone from St. Asaph, that of Bishop Isaac Barrow, uncle to the great theologian and preacher of the same name, who was his godson and namesake. This stone stood near the bishop's tomb, in the west wall of the cathedral, and close by the main entrance. The inscription on the tombstone ran thus: "O vos transeuntes in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini . . . . 1680." This stone was actually taken out and sent up to London in 1838, that the learned Dean of Arches might see the inscription with his own eyes. The stone was never sent back. The Dean and Chapter of St. Asaph have, I believe, recently placed another stone in the spot left vacant with the same inscription on it.

It is obvious that Bishop Isaac Barrow's inscription is modelled on St. Paul's words about Onesiphorus in 2 Tim. i. 16—18. There we read: "The Lord give mercy unto the house of Onesiphorus; for he oft refreshed me, and was not ashamed of my chain: But when he was in Rome he sought me out very diligently and found me. The Lord grant unto him that he may find mercy of the Lord in that day." And again, in chapter iv. 19, of the same Epistle, we read: "Salute Prisca and Aquila, and the household of Onesiphorus." The whole air of the passages I have referred to suggest that Onesiphorus was dead, and that the Apostle wrote these words in affectionate and grateful memory of him. Nearly all the learned who have expounded these passages take this view, so apparently did Bishop Barrow. It may, however, be said that the Apostle's words, "The Lord grant unto him that he may find mercy of the Lord in that day," are rather a pious aspiration than a prayer for the deceased.

Very much to the purpose is the inscription on the tomb of John Cosin, Bishop of Durham. He lies in the chapel of

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Auckland Castle, which he restored in 1662, after the waste and havoc wrought by the victorious sectaries under Cromwell. The inscription on his tombstone, which lies in the middle of this stately chapel in front of the communion table, records the day of his death—January 15, 1671—and then tells us he is buried here, "expectans felicem corporis resurrectionem ac vitam in cœlis æternam," and concludes with the words "Requiescat in pace." Now this inscription was composed by himself, and was inserted in one of the clauses of his will. There is no one man of higher authority—as regards the doctrine of the Church of England at the Restoration—than Bishop Cosin. His was quite the leading spirit in the revision of the Prayer Book in 1662, and to him we owe several of the additions then made to the collects and several restorations of ancient elements in various offices. These, of course, were considered by the Convocations, but in very many cases originated with him. It would not be easy for an ecclesiastical Court to reject on doctrinal grounds a form of words deliberately adopted by so great an authority as Bishop Cosin.

In the Church of St. Saviour's, Leeds, built when Dr. Hook was vicar, though not by him, is an inscription which runs thus: "O ye that enter this holy place, pray for the sinner that built it." It must be some fifty years since that church was consecrated, and no doubt he that built and asked the prayers of the worshippers for whom he had provided has long ago gone to his account. I suppose also the bishop of the diocese, Bishop Longley, afterwards Archbishop of Canterbury, did not disapprove of the inscription, or he would have ordered it to be erased before consecrating the church. Something to the purpose are the inscriptions placed beneath several stained-glass windows in the Church of Llangurig, Montgomeryshire, to which my attention has been called by Colonel Lloyd Verney, whose wife's uncle effected the restoration of the church about fourteen years ago. I take one as a sample of the inscriptions in question: "To the memory of Gwenwynwyn, Prince of Powys, deceased in the year of salvation 1218, who bestowed on Madoc the Fire-bearer, his faithful soldier and companion, all the lands in the dominion of Llangurig . . . . on whose soul may God have

mercy." There are several similar inscriptions, but it seems pretty certain, whatever be their significance, that they were placed in the church without any authority, and therefore illegally.

There is no doubt that in private devotion the practice of praying for the departed was retained by many of our bishops and theologians—by John Wesley amongst them: see Dean Luckock's "After Death," p. 250. We may note also that Keble, in the beginning of the "Lyra Innocentium" (p. v.) has a verse which may be quoted here:—

> "There are who love upon their knees
> To linger when their prayers are said,
> And lengthen out their litanies
> In duteous care for quick and dead."

But the definite forms of such prayers, which were found in the first English Prayer Book of 1549, were withdrawn in 1552, and never restored in the revisions which followed in 1559, 1603, and 1661. And it is noteworthy that our revisers should have hesitated then, because they did on the last occasion restore the commemoration of the faithful departed to the "Church Militant" prayer. And Bishop Cosin has left it on record that certain words in the First Thanksgiving after Communion—"That we and all Thy whole Church may obtain remission of our sins, and all other benefits of Thy Passion"—were retained in the service of set purpose, as a cumulative expression intended to include both the living and the dead. ("The Intermediate State between Death and Judgment," p. 215.) Still, admitting this, the words are only an oblique and general form of such prayers as we are now considering. They have not that direct and personal reference and application which the proposed inscription exhibits.

Some devout persons have earnestly hoped that such intercessions for the departed should be re-inserted in the Liturgy as are found in the Prayer Book of 1549 in the following words:—

"We commend unto Thy mercy, (O Lord), all other Thy servants which are departed hence from us with the sign of faith, and now do rest in the sleep of peace: grant unto them, we beseech Thee, Thy mercy and everlasting peace; and that at the

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day of the general resurrection we and all they which be of the mystical body of Thy Son may be altogether set on His right hand," &c. (1)

But this reinsertion has not yet taken place, and the reason for caution is clear. Out of the ancient prayers for the departed grew the notion that they need to be succoured by the prayers of the living; hence that they are undergoing sufferings and even torments, from which the prayers of survivors might assist to relieve them, and so by rapid steps we reach the Romish doctrine condemned by the Twenty-second Article. Prayers for the dead are unquestionably associated in the popular mind with the later exaggerations referred to in that Article, and it may be added that a bequest made for such prayers being offered would be void by the common law of the realm as superstitious. And therefore, though in private such prayers may be offered, as conformable to the ways of the Primitive Church, certainly from the second century and downwards; and however deeply we may sympathise with sentiments of affectionate respect in the bereaved, fired as they often are by strong realizing of the truth of the Communion of Saints, it does not seem to belong to a Court of first instance to do what the formularies of the Church have abstained from doing; it is not for me here to authorize directly the setting up in a place of public worship of an inscription demanding the prayers of the worshippers for the souls of certain persons who have departed this life.

In the result I must decline to sanction the inscription brought in on September 28 last, being placed in the church, and accordingly so much of the application before me as prays that a faculty might be granted for placing such inscription beneath the proposed window must be rejected.

The solicitor for the promovent prayed the Court to allow the following amended inscription to be placed beneath the proposed window:—

"Ad majorem Dei gloriam et in piissimam memoriam Henriettæ Franciscæ viduæ Georgii Hamerton Crump de

(1) See the "Two Books of Common Prayer set forth . . . . in the reign of King Edward the Sixth compared. . . ." Cardwell, ed. 1852, p. 296.

Chorlton Hall in hoc comitatu mortuæ die XXIII. Augusti A.D. MDCCCXCII. ætatis suæ LXXV. Et in talem memoriam Johannis Hamerton Crump supradictorum filii majoris mortui die II. Martii A.D. MDCCCLXXXVII. ætatis suæ XXXIII. Requiescant in pace."

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THE CHANCELLOR. The Court approves of this amended inscription being placed in the church, and decrees a faculty to issue for the erection of the window, the design of which has been approved, with this amended inscription placed on a brass beneath it.

Solicitor for promovent: *Ernest Radclyffe Crump.*

C. F. J.

IN THE GOODS OF SHOOSMITH.

1893 Oct 30.

Probate—Administration with Will Annexed—No Executor or Residuary Legatee—Testatrix deserted by her Husband—"Special Circumstances"—Grant to Son without citing Husband—Practice—The Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

Upon an application for administration with the will annexed, it appeared that the testatrix had been deserted by her husband fifteen years prior to her death, and had not heard of or from him after such desertion.

The Court passed over the husband without citation of any kind, and granted administration with the will annexed, under s. 73 of the Court of Probate Act, 1857, to a son of the testatrix, who by the will was nominated trustee and manager of a certain partnership interest which represented substantially the whole of the estate of the testatrix.

APPLICATION for administration with the will annexed.

Mary Ann Shoosmith, late of the Mineral Springs, Flitwick, in the county of Bedford, died on April 18, 1893, leaving a will of January 28, 1893, in which no executor or residuary legatee was named. The testatrix left Thomas Henry Fullick, Arenia Mary Fullick, and Henry Fullick, children by a former husband, her surviving. Henry Shoosmith, the second husband of the testatrix, deserted her more than fifteen years before her death. He was believed to have gone to Australia; but none of his relatives or friends had since heard of him, and they believed him to be dead. Practically the whole property of the testatrix

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consisted of an interest in the Flitwick Mineral Springs; and, by her will, she appointed Henry Fullick, one of her sons, to be trustee and manager of her share or interest in that property. The three children of the testatrix were said to be in bad pecuniary circumstances, and urgently in need of the money, which, it was stated, they would be entitled to from the realization of their mother's interest in the Mineral Water Springs above mentioned.

W. M. Cann, on behalf of Henry Fullick, moved the Court to grant administration with the will annexed to him, under s. 73 of the Court of Probate Act, 1857, and to dispense with the citation of Henry Shoosmith, the husband of the testatrix. The "special circumstances" in this case are, that the estate does not comprise 10*l.* worth of property apart from the share or interest of the deceased in the Flitwick Mineral Springs, and which is said to be worth between 4000*l.* and 5000*l.*

The person who was partner with the testatrix in the business of the Flitwick Springs refuses to recognise the children or to give them any share of the profits, which are considerable. This is the only property which they have to live upon. If a citation of the husband is required, great delay will necessarily arise.

GORELL BARNES, J. I grant administration with the will annexed, under s. 73, to Henry Fullick, without requiring him to cite the husband of the testatrix. Justifying security must, of course, be given.

Solicitor for applicant: *Claude Ormerod, Croydon.*

W. L.

[IN THE COURT OF APPEAL.]

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Oct. 25;
Nov. 8.

BUTLER *v.* BUTLER.

Divorce—Estoppel—Verdict followed by Decree Nisi—Rescission of Decree Nisi for Collusion and Suppression of Matcrial Facts.

The verdict of the jury at the trial of a petition for divorce by a wife against her husband finding that the husband has been guilty of adultery and cruelty, and a decree nisi in accordance with such verdict, are conclusive evidence of such adultery and cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against his wife. And the mere fact that such decree nisi has been set aside by the Court upon the intervention of the Queen's Proctor, the grounds upon which it was set aside not affecting the propriety of the verdict, does not prevent the findings of the jury from being conclusive evidence in the second suit.

APPEAL by a husband from an order of the President rescinding a decree nisi for dissolution of marriage.

In November, 1887, the wife presented a petition for dissolution of marriage on the ground of adultery and cruelty. The husband denied the charges, and presented a counter-petition for dissolution on the ground of the wife's adultery with one Burnham, who was supposed to be the father of a child born to the wife. The wife filed her answer denying adultery, and made further charges of adultery against the husband.

The suits were consolidated, and came on for trial before Butt, J. After the first day of the trial an agreement was come to between the parties, signed by them and their solicitors, that the wife should give evidence of cruelty and of the husband's adultery with Miss W., and withdraw the other charges of adultery, and that the husband's petition should be withdrawn.

On the following day this agreement was made known to the judge, who, however, allowed the trial to proceed. The jury found—(1.) that the husband had committed adultery with Miss W. only; (2.) that he had been guilty of cruelty; (3.) that the wife had not committed adultery with Burnham. The judge, on June 25, 1888, granted the wife a decree nisi, but directed the papers to be laid before the Queen's Proctor. The Queen's Proctor intervened, and, by his plea, alleged—(1.) suppression of material facts; (2.) adultery of the wife with Burnham;

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(3.) collusion. The case was tried before Butt, J., on August 8, 9, and 10, 1889. The jury found suppression and collusion, but could not agree as to the alleged adultery with Burnham. On these findings the judge rescinded the decree nisi, and his decision was, on January 17, 1890, affirmed on appeal. (1) By a subsequent order both petitions were dismissed.

On April 7, 1891, the husband presented a fresh petition for dissolution of marriage, alleging that the wife was, on or about January 7, 1885, delivered of a child of which the petitioner was not the father, and that he did not know and had been unable to ascertain who was the father of the child.

On April 21, 1891, the husband moved for leave to proceed without a co-respondent. The motion was adjourned in order to serve the Queen's Proctor, who was served, and leave to proceed without a co-respondent was given on May 5, 1891.

On March 19, 1892, the petition came on for hearing as an undefended suit, and a decree nisi was made.

The Queen's Proctor intervened to shew cause why the decree should not be made absolute; and, on June 29, 1892, filed a plea, alleging, among other things, that the findings of the juries on June 25, 1888, and August 10, 1889, and the judgments of the Divorce Court on August 10, 1889, and the Court of Appeal on January 17, 1890, were an estoppel to the granting the prayer of the husband's present petition; and that it was res judicata that the husband had been guilty of adultery and cruelty; and that in prosecuting a former petition against the wife in respect of the adultery now charged he had been guilty of collusion, was res judicata. He alleged in the alternative, that the husband had been guilty of adultery and cruelty, as alleged by the wife in the former suit.

On March 14, 1893, a motion by the Queen's Proctor to dismiss the petition was heard by the President, who held that the husband was not estopped; but that the Court was bound to hold the findings in the former suit to be conclusive evidence. The learned President, however, said, that it would be open to the husband to shew at the trial that such collusion was not in regard to this petition; and in respect to adultery and cruelty,

(1) 15 P. D. 66.

it would be open to him to shew that there were circumstances which might induce the Court not to withhold relief. (1)

The suit came on for trial on May 30. The President treated the findings as to cruelty and adultery as conclusive, and did not allow the husband to adduce evidence to rebut them; and, being of opinion that it was not a case where, in his discretion, relief should be granted to the husband notwithstanding his adultery and cruelty, he rescinded the decree nisi.

The husband appealed.

Oct. 25. *Channell, Q.C.*, and *Stanger*, for the husband. The President thought himself bound by *Conradi* v. *Conradi* (2) to hold that the findings of the jury at the first trial were conclusive evidence in the present proceeding. But in that case there was a judgment in force dismissing the petition on the ground that the petitioner had himself been guilty of adultery, so there was a verdict followed by a judgment which remained in force. A verdict not followed by a judgment is no evidence at all, as was laid down by Lord Cottenham in *O'Connor* v. *Malone* (3); and Lord Penzance in *Bancroft* v. *Bancroft and Rumney* (4) expressed himself to the same effect, though the decision went mainly on another ground. Now if a judgment is set aside, the parties are in the same position as if there had never been any judgment at all, and the verdict, therefore, is not evidence.

Lockwood, Q.C., and *Jacques*, for the Queen's Proctor. In the former suit there was a finding that the husband had been guilty of adultery and cruelty, and a judgment against him on that finding. Owing to misconduct in which he had a share, that judgment was set aside; but the rescission in no way impeached the verdict: it proceeded on the ground that the parties had dehors the verdict been guilty of conduct which disentitled them to the benefit of the judgment. The reason given by Lord Cottenham for not holding a verdict evidence, viz., "that there is nothing to shew that such verdict may not have been set aside or may not have been acted upon by the

(1) [1893] P. 185.
(2) Law Rep. 1 P. & D. 514.
(3) 6 Cl. & F. 572, 596.
(4) 3 Sw. & Tr. 597.

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Court," does not apply in such a case as the present. [*Needham* v. *Bremner* (1) was referred to.]

Channell, Q.C., in reply. The rescission of a decree nisi on the ground of collusion must be taken to impeach the verdict, for it goes far to shew that there was no fair trial.

Cur. adv. vult.

1893. Nov. 2. A. L. SMITH, L.J., delivered the judgment of the Court as follows:—The first question in this appeal is whether a verdict in a suit brought by a wife against a husband for dissolution of marriage, which established that the latter had been guilty of adultery and cruelty, and which was followed by a decree nisi, is conclusive evidence of such adultery and cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against his wife. Secondly, it it be, whether the fact of the decree nisi having been rescinded upon proof by the Queen's Proctor that material facts had been collusively withheld from the knowledge of the Court causes such verdict and decree not to be conclusive evidence of the husband's guilt, which otherwise would be the case. Sir Francis Jeune held that such verdict and decree, though the latter had been rescinded, were conclusive evidence of the husband's guilt, and hence the present appeal.

A decree in the Divorce Court, whether nisi or absolute, is the judgment of that Court, founded upon the verdict given. Sir James Wilde pointed this out in *Bancroft* v. *Bancroft and Rumney* (2), when he said "that in suits in that Court the decree took the place of the judgment of a Common Law Court."

That judgments are conclusive inter partes respecting the point directly decided therein is beyond dispute, the ground being that it is for the interest of the State that a limit should be placed upon the continuance of litigation, and, consequently, the same cause of action or issue when once decided cannot be again brought up for adjudication between the same parties. See what Parke, B., says upon this subject in *Boileau* v. *Rutlin* (3), and *Newington* v. *Levy* (4), in the Exchequer Chamber.

(1) Law Rep. 1 C. P. 583.
(2) 3 Sw. & Tr. 597.
(3) 2 Ex. 665, 681.
(4) Law Rep. 6 C. P. 180.

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It was upon this principle that Lord Penzance proceeded in *Conradi* v. *Conradi* (1), when he held that the verdict and judgment in a former suit of the husband's adultery was conclusive evidence in a second suit between the same parties of the fact of such adultery having been committed. It cannot, we think, be doubted if in the present suit the decree nisi had remained unrescinded or had ripened into a decree absolute, that then the verdict and decree in the former suit would have been conclusive evidence in the present suit of the husband's adultery and cruelty, and that it would not have been open to the husband in the present suit to controvert the fact of such adultery and cruelty having been committed by him.

But here arises the second point, for the decree nisi granted in the former suit has been rescinded, and it is said that as a verdict not followed by judgment is no evidence at all, as no judgment is now extant it is the same thing as if there had been no judgment at all. We think Mr. Channell was well founded when he said, that in ordinary actions at law or issues directed by a Court of Equity, a verdict given therein and not followed by a judgment, is no evidence at all. The Lord Chancellor (Lord Cottenham), in *O'Connor* v. *Malone* (2) said: "It is a well-known rule of law that a verdict without judgment is no evidence at all, the reason being that there is nothing to shew that such verdict has not been set aside or may not have been acted upon by the Court"; and Sir James Wilde, in *Bancroft* v. *Bancroft and Rumney* (3) above referred to, stated the same thing. It appears to us that in ordinary cases if a verdict be followed by a judgment, and such judgment is afterwards set aside, the verdict falls with the judgment, and, as was held in *O'Connor* v. *Malone* (4), neither party can give such verdict in evidence upon the second trial. But why is this? A judgment in such cases is set aside upon the ground that the verdict upon which it is founded was obtained either by fraud or by misdirection of the judge, or against evidence, or by surprise, or by some other means, which shewed that the verdict itself could not be supported, and consequently a judgment founded thereon was

(1) Law Rep. 1 P. & D. 514.
(2) 6 Cl. & F. 572, at p. 596.
(3) 3 Sw. & Tr. 597.
(4) 6 Cl. & F. 572.

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erroneous. In such cases the setting aside of the judgment vacates not only the judgment but the erroneous verdict, and places the parties in the same position as if no verdict had been given. But how does this apply to a case like the present? The verdict was followed by a judgment, and no fraud or error existed in the obtaining of that verdict, which stands unimpeached and upon which the decree nisi was founded. As regards the issues adjudicated upon between the parties, all was in order, and the judgment given thereon (i.e., the decree nisi) was perfectly valid and would have remained in force, and in due course would have become a decree absolute, had it not been that, dehors the verdict and wholly unconnected therewith, it was subsequently ascertained that the husband and wife had been guilty of conduct which disentitled them from reaping the benefit of the decree which both in this case so much desired. The material facts suppressed related to the conduct of the wife, not to the conduct of the husband. If any evidence favourable to him was suppressed he intentionally suppressed it, and he ought not to be allowed to reopen the case which was proved against him. If it could be shewn that the verdict in the first suit had been impeached, and that upon this ground the decree nisi had been set aside, we should have held that Mr. Channell's argument was correct; but nothing of the sort can be shewn, for it is not the fact.

For the reasons above the points made for the petitioner fail. In the circumstances of this case the verdict and decree were in our opinion conclusive evidence of the husband's guilt. It would indeed be intolerable if a litigant were entitled to reagitate and retry issues found against him, and which finding he had acquiesced in for years, and to reopen a litigation which long since had been closed. It would be a flagrant transgression of the principle upon which judgments have always been held conclusive inter partes; the law does not permit it, and this appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Fox and Joy.*
The Queen's Proctor.

H. C. J.

CAREW *v.* CAREW (THE QUEEN'S PROCTOR SHEWING CAUSE). 1893 *Nov.* 28.

Divorce—Practice—Wife's Petition—Decree Nisi—Queen's Proctor's Intervention—Leave to Queen's Proctor to add Charge of Adultery against Petitioner—Motion by Person with whom Adultery charged—Refusal of Leave to Intervene—Jurisdiction.

Where a wife had obtained a decree nisi, dissolving her marriage on the ground of adultery and cruelty, and the Queen's Proctor intervened, alleging, in his plea, collusion, condonation, and suppression of material facts, leave was given to the Queen's Proctor, in the course of the trial, to add a charge of adultery which he alleged had been committed by the petitioner with one, L. E., who thereupon moved for leave to intervene and defend himself from the charge:—

Held (following *Grieve* v. *Grieve*, [1893] P. 288), that there was no jurisdiction to permit such an intervention.

MOTION by Mr. Loftus Earle for leave to intervene and defend himself against a charge of adultery which had been formulated against him in the course of the trial of an intervention by the Queen's Proctor.

The petitioner, Mrs. Carew, had obtained a decree nisi against her husband for dissolution of the marriage on the ground of his adultery and cruelty. The Queen's Proctor subsequently intervened and filed his plea, alleging that the petitioner and respondent had been guilty of collusion; that the matrimonial offences, upon which the decree nisi had been pronounced, had been condoned by the petitioner; and that, at the hearing, material facts had been withheld from the knowledge of the Court.

The petitioner denied these charges, and the case came on for trial before Gorell Barnes, J., and a special jury. During the trial the learned judge gave leave, upon the application of the Queen's Proctor, to add a charge of adultery, alleged to have been committed by the petitioner with one Loftus Earle. The petitioner denied the charge.

Murphy, Q.C., on behalf of Mr. Loftus Earle, moved that leave be given to him to intervene forthwith in the proceedings. It is but reasonable, when a man is charged with adultery, especially

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when the charge is made on such short notice as this was, that he should be allowed to come in and defend himself.

[GORELL BARNES, J. It seems only reasonable; but the difficulty I feel is as to whether I have power to allow the intervention.]

Crackanthorpe, Q.C. (*Deane*, and *Guy Stephenson*, with him), for the Queen's Proctor, opposed the application, and relied upon *Grieve* v. *Grieve*. (1)

[GORELL BARNES, J. Am I not bound by that decision?]

Murphy, Q.C. No; that was a decision in chambers, and is not binding on the Court. [*Wheeler* v. *Wheeler and Rhodes* (2) was also referred to.]

GORELL BARNES, J., after consulting the President, said:—The President confirms the view which he expressed when *Grieve* v. *Grieve* (1) was before him in chambers, and as no authority or Act of Parliament has been produced authorizing such an intervention as I am now asked to sanction, I must refuse it. I believe I am correct in saying that formerly no intervention was allowed; and that it is only by virtue of the Divorce Act, 1857, that co-respondents are brought upon the scene. By s. 28 it is enacted that, upon a petition by a husband for divorce, the alleged adulterers are to be made parties to the suit, unless the petitioner obtains leave to proceed without making them co-respondents; and the second part of the section provides that on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent. Acting upon the decision in *Grieve* v. *Grieve* (1), and in the absence of authority to the contrary, I must refuse this motion.

Solicitors for applicant: *Valpy, Chaplin, & Peckham.*
The Queen's Proctor.

(1) [1893] P. 288. (2) 14 P. D. 154.

W. L.

EDWARDS *v.* EDWARDS AND FRANCIS. 1893 Dec. 6, 9.

Divorce—Husband's Petition—Countercharges—Findings of Adultery against Respondent and co-Respondent, and of Cruelty against Petitioner—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretionary Bar—Decree Nisi—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Petitioner to secure Maintenance for Respondent, to be payable dum sola et casta vixerit.*

Upon a petition by a husband for divorce on the ground of his wife's adultery, in which the respondent countercharged cruelty and adultery, the jury found that the respondent and co-respondent had committed adultery; that the petitioner had not committed adultery, but that he had been guilty of cruelty towards his wife. There was no finding as to whether the petitioner's cruelty had conduced to the respondent's adultery.

The Court, being of opinion that the adultery of the respondent with the co-respondent was not brought about by the petitioner's cruelty, exercised its discretion under the Matrimonial Causes Act, 1857, s. 31, by pronouncing a decree nisi, at the same time directing that the decree should not be made absolute unless the petitioner secured to his wife, by deed, an allowance of 36*l.* a year for her maintenance.

The Court further ordered that the deed should contain a clause, providing that the allowance to the wife should only be payable so long as she should remain chaste and unmarried.

Badham v. *Badham and Gorst* (62 L. T. 663) followed.

Lander v. *Lander* ([1891] P. 161) distinguished.

CASE on consideration as to the findings of the jury in a divorce suit, in which adultery between the respondent and co-respondent was proved, and a countercharge of cruelty was established against the petitioner. Leopold Alexander Edwards, the petitioner, was married to the respondent Eliza Edwards on July 26, 1873, and one child, issue of the marriage, was born in 1887. After the petition was filed, the respondent gave birth to another child, of which the paternity was denied by the petitioner. The petitioner was a farmer, possessed of small private means. The respondent was a farmer's daughter. The petition, which was filed early in 1893, alleged that the respondent and co-respondent had committed adultery in the months of May, June, and September, 1892. The respondent, in her answer, denied the adultery, and alleged that on frequent occasions in the years 1885 and 1886 the petitioner committed adultery with a certain

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woman, and that in the year 1892 he committed adultery with another woman. The answer also contained allegations of cruelty and violent conduct towards the respondent. The chief allegations, shortly stated, were the following: November 12, 1885, blow in the face; August 25, 1886, blow and throwing carving-knife at respondent; September 5, 1886, that petitioner was bound over to keep the peace for six months; September, 1891, violent assault, blow in the face, threats; on other occasions, turning her and her infant child out of doors at night; blows, and threatening language; December 17, 1892, threatening to murder the respondent and behaving violently towards her, under circumstances hereinafter mentioned.

The respondent left her husband on November 2, 1892, and, on November 12, he summoned her for stealing some clothes which she stated that she had taken for herself and her child. This summons was withdrawn. On December 10, 1892, the petitioner summoned his wife for stealing a pony, which he alleged to be his property. The summons was adjourned for a week, and, on December 17, 1892, it was dismissed, the magistrate ordering that the pony should be restored to her. That same night, the petitioner, accompanied by several men, went to the house where the respondent was staying, threatened her, broke open the stable and took the pony away again. In consequence of this, the petitioner was summoned by his wife, and, on December 19, he was bound over in a sum of 50*l.*, with one surety for 50*l.*, to keep the peace for twelve months.

The case came on for trial before Gorell Barnes, J., and a jury; and, on November 18, 1893, the jury found that the respondent and co-respondent had committed adultery; that the petitioner had not committed adultery; but that he had been guilty of cruelty towards the respondent. The jury were then discharged, and, on December 9, the case came before the Court for further consideration.

Deane, for the petitioner, moved the Court to pronounce a decree nisi. If the Court sees fit to order the petitioner to make the respondent an allowance, he is willing to do so. An affidavit filed by the petitioner states that his income is only

126*l.* 14*s.* 5*d.* per annum, and that the costs of the trial which he will have to bear amount to over 300*l.*

Barnard, for the respondent. It is not necessary for present purposes to determine the exact amount of the petitioner's income. Since the registrar dealt with that matter, upon the petition for alimony pendente lite, the only deduction to be made from capital is the sum of about 300*l.*, which the petitioner says he will have to pay for costs. The registrar allotted alimony pending suit at the rate of 15*s.* per week. That is a bare maintenance, and the Court, if it pronounces a decree nisi, should order the petitioner to secure that allowance to the respondent. If the petitioner will not consent to such an order, the petition ought to be dismissed. In a number of cases where a husband has been the petitioner, and where cruelty has been proved against him, the Court has granted him a decree nisi, but always upon condition that the decree should not be made absolute until a proper provision had been made by him for the future maintenance of the respondent. Every case must, however, depend on its own facts. The cruelty proved in this case was of a very serious character, and the words of 20 & 21 Vict. c. 85, s. 31, make it immaterial that some of the acts of cruelty were condoned. In *Stoker* v. *Stoker* (1), where both the petitioner and respondent were found guilty of adultery, the Court dismissed the petition.

[GORELL BARNES, J. The language of Butt, J., in that case is also applicable to cruelty.]

Even if all the cruelty had been condoned, that would not be material to the present application: *Story* v. *Story & O'Connor.* (2) The petitioner in the present case was summoned on three separate occasions for cruelty to his wife; in 1886, he was bound over to keep the peace; in 1888, the summons was withdrawn upon an agreement for a separation being entered into; and, in 1892, he was again bound over. The last act of cruelty was committed after the final separation. It is, no doubt, better in the wife's interests that an allowance should be made for her maintenance, and, if that is done, she does not oppose the granting of a decree. The jury were judges of the

(1) 14 P. D. 60. (2) 12 P. D. 196.

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facts, and the respondent feels bound to accept the verdict of adultery which has been found against her. But if the petitioner refuses to make her an allowance, the Court ought to dismiss the petition.

[GORELL BARNES, J. Is there any reported decision which indicates the class of cruelty upon which the discretion conferred by s. 31 is to be exercised in such cases as this?]

If the Court is of opinion that the cruelty of the petitioner has actually brought about the adultery of the respondent, it ought to dismiss the petition. If the Court is not satisfied upon that point, then the discretion may be exercised in favour of the petitioner. The jury did not find, as a fact, that the cruelty conduced to the adultery. Cruelty by a petitioner does not stand on the same footing as adultery: *Boreham* v. *Boreham* (1); *Lempriere* v. *Lempriere and Roebel* (2).

[GORELL BARNES, J. But in each of those cases something more than cruelty was established against the petitioner. Is there no reported case, shewing how the Court has exercised its discretion where cruelty only has been established against a petitioner?]

[*Durley Grazebrook*, amicus curiæ, referred to *Badham* v. *Badham and Gorst.* (3)]

If the Court decides to exercise its discretion by granting a decree and ordering an allowance, the deed by which the allowance is secured should not contain a dum sola et casta clause. The late President repeatedly expressed disapproval of the dum casta clause, and the former President, Lord Hannen, in *Lander* v. *Lander* (4) directed an allowance to be made by the petitioner to his guilty wife without any restriction as to her future condition or mode of life.

Deane, in reply. If no dum casta clause were inserted, it would be tantamount to saying that the respondent and co-respondent should be at liberty to live together and that the petitioner should contribute to their maintenance. As to the cruelty, the wife continued to live in the same house with her husband until the final separation in November, 1892, and was

(1) Law Rep. 1 P. & D. 77.
(2) Law Rep. 1 P. & D. 569.
(3) 62 L. T. 663.
(4) [1891] P. 161.

not, therefore, in fear of her life. Her condonation of all previous acts of cruelty was an absolute blotting out of those offences: *Bernstein* v. *Bernstein*. (1)

Cur. adv. vult.

Dec. 9. GORELL BARNES, J., after stating the facts, said:—The question then comes to be one for decision under s. 31 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), and I am asked to exercise my discretion in favour of the petitioner, under the proviso of that section. A number of authorities were cited in the course of the arguments, but for the purposes of this judgment I need only refer to one or two of the cases. In *Pearman* v. *Pearman and Burgess* (2), the Judge Ordinary said: "As the jury have found that the petitioner has proved his charge of adultery, and also that he has been guilty of cruelty, the Court has now to exercise the discretion given to it by the 31st section. If there were reason to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage." In *Lempriere* v. *Lempriere and Roebel* (3), I find that Lord Penzance says this: "I am aware, that, in the Ecclesiastical Court, there is more than one decision, that, by way of compensatio criminis, cruelty is no answer to adultery. At the same time, there are passages to be found in one judgment, at least, which tend to make it doubtful whether such a rule would be applied where the cruelty preceded and brought about the adultery." That was a suit by the husband for dissolution of marriage, and it was established that the wife was guilty of adultery, and the husband of cruelty and of misconduct conducing to her adultery. The Court refused to amend the husband's petition, by allowing a prayer for a judicial separation to be substituted, and it was dismissed. But in *Badham* v. *Badham and Gorst* (4), to which Mr. Grazebrook, as amicus curiæ, referred me, where the wife had obtained a decree of judicial separation on the ground of her husband's cruelty, and the husband subsequently petitioned the Court to dissolve the marriage on the ground of adultery com-

(1) [1893] P. 292.
(2) 1 Sw. & Tr. 601.
(3) Law Rep. 1 P. & D. 569.
(4) 62 L. T. 663.

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mitted by his wife after the decree for judicial separation, Lord Hannen exercised his discretion in favour of the husband, and granted him a decree.

There is, therefore, no doubt that there have been cases in which, notwithstanding that cruelty has been proved on the part of the petitioner, the Court has pronounced a decree nisi. This, as was pointed out in *Pearman* v. *Pearman and Burgess* (1), has been done more particularly in cases where the cruelty established against a petitioner has not been of such a nature as to have brought about the misconduct of the respondent. When one considers the last sentence of s. 31 of the Divorce Act, 1857, it rather favours the view that there are cases in which, although cruelty has been found, yet the Court would, in some instances, exercise the discretion conferred upon it by the Act in favour of the petitioner. Looking at all the circumstances of this case, and taking into account the fact that there was no finding that the husband's cruelty in any way conduced to his wife's adultery, I have come to the conclusion that I may properly exercise my discretion by pronouncing a decree nisi, especially in view of the fact that it is not resisted by the wife. I have, however, been asked, and, I think, rightly asked by her counsel, to impose upon the husband terms in connection with the decree. Then comes the question: What terms ought I, under s. 32 of the Divorce Act, 1837, to impose upon him? I have been asked to suspend the decree until the husband shall have secured to his wife, by deed, to the satisfaction of the Court, a proper maintenance for her future support; and I have also been asked to direct that the deed should not contain a clause dum sola et casta vixerit. On the other hand, the husband asks me to insert that clause in the deed. Exercising my best judgment on these two points, I have come to the conclusion that the amount of the allowance which the husband ought to secure to his wife, under s. 32 of the Act, should be the same as the registrar ordered as alimony pendente lite, namely, 36*l.* a year; and I think that, having regard to the general features of this case, the dum sola et casta clause ought to be inserted.

I pronounce a decree nisi, but direct that it shall not be made

(1) 1 Sw. & Tr. 601.

absolute unless and until the petitioner has secured to the respondent, by a proper deed, the sum of 36*l.* per annum, dum sola et casta vixerit.

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Solicitor for the petitioner: *T. J. Rossiter, for E. B. Titley, Bath.*

Solicitors for the respondent: *Meredith, Roberts, & Mills, for Basil A. Dyer, Bath.*

W. L.

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Nov. 13; *Dec.* 2.

Probate—Testamentary Papers—Incorporation—Will dealing with Real and Immoveable Property in a Foreign Country.

Where a testator, domiciled in England, left a will and two codicils dealing with real and personal property in this country, and personal property in Russia; and also left two other documents, one of which was a will, duly executed in accordance with English law, and both referring only to property in Russia, and appointing separate executors in respect of that property;

Upon the joint application of the executors and trustees of all the property in both countries:—

The Court refused to allow the documents referring only to property in Russia to be included in the probate of the English will and codicils.

APPLICATION for probate.

William Cloves Tamplin, by his will of August 1, 1889, bequeathed all his property to certain persons, and appointed Alexander Miller Hallett, of Norway Wharf, Rotherhithe Street, London, "executor and trustee of this my will for all the purposes thereof, including all matters relating to my partnership business of 'S. King' hereinafter mentioned and my share of capital and profits therein and I appoint . . . Arthur John Berger, of Elm Grove, Maidenhead, in the county of Berks and . . . Charles Stewart King, of 40, Chancery Lane, London, executors and trnstees for the general purposes of this my will, other than the matters relating to my said partnership business and my share of capital and profits therein, to act with the said Alexander Miller Hallett for such general purposes. . . ."

The testator was engaged in a partnership business, carried on exclusively in Russia, with the said Arthur John Berger and Charles Stewart King, under the firm of "S. King." He left

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property in England to the extent of some 200,000*l.*, exclusive of his interest in the manufacturing business at St. Petersburg, which was of the value of about 30,000*l.*, and in addition to this his real estate in Russia was estimated to be worth about 11,000*l.* By a codicil, dated February 14, 1890, the testator appointed his son, Richard William Tamplin, to be an executor in reference to his partnership business of "S. King" jointly with the said Alexander Miller Hallett, and he further declared that his said son might act in the execution of the trusts and powers of the said will and codicils for the purposes only as to the said partnership business and the testator's share of capital or profits therein (but not further or otherwise), notwithstanding that he might not in fact have proved such will and codicils either in England or in any other country.

The testator duly executed another codicil, which he described as a second codicil to his will of August 1, 1889, and which was dated June 2, 1890, but was really executed on June 3. In this codicil the testator referred to a deed of covenant, bearing date May 16, 1890, as follows: "Whereas I have arranged with my friend Alexander Miller Hallett and my son Richard William Tamplin that I shall devise to them absolutely my real estates in the empire of Russia, and by an indenture, dated the 16th day of May, 1890, and made between the said Alexander Miller Hallett and Richard William Tamplin of the one part and myself of the other part, they have covenanted with me and it is declared as to all land or other real or leasehold estates in Russia which may be devised or bequeathed by me to them that they respectively and the persons deriving title under them respectively shall stand possessed thereof upon the trusts following." Then followed a recital of certain trusts and directions as to the sale, letting, and management of the said property, as if the said "partnership executors" were the absolute owners thereof and for remitting the proceeds "to the trustees in England for the general purposes of my will and codicils" to be held by the "general trustees" upon such trusts and for such purposes as the testator by such will and codicils should declare concerning the same. The second codicil proceeded thus: "And whereas I intend by a will to be executed by me in accordance with and

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so as to comply with Russian law, on the day following the date of this second codicil, to devise all my lands, warehouses, buildings, and premises situate in . . . . St. Petersburg, and all other . . . . real and immoveable property . . . . in Russia unto the said Alexander Miller Hallett and Richard William Tamplin in equal shares and to institute them my heirs in respect thereof: Now I do hereby declare as follows:—I revoke all devises and bequests, directions and provisions in my said will dated August 1, 1889 and my said first codicil thereto dated February 14, 1890 contained, so far as the same relate or would or could relate to my lands and other real and immoveable property (including leaseholds) . . . . in Russia, but not further or otherwise, and I declare that my said will and first codicil shall take effect only in respect of my personal property (other than leaseholds situate in the Empire of Russia) and in respect of my lands and other immoveable property (including leaseholds) situate elsewhere than in Russia and shall not in any way affect my real and immoveable property (including leaseholds, if any) situate in Russia."

The codicil went on to declare that the "general trustees" of the testator should hold the proceeds of his land and immoveable property in Russia, when received, upon the same trusts as were declared by the will and first codicil in respect of the proceeds of his real estate in England, and should be applied in like manner as the will and first codicil directed in regard to his English realty.

On June 3, 1890, after the execution of the second codicil, the testator executed, in the presence of three witnesses, a testamentary document in the following terms:—

"I, William Cloves Tamplin, of Brighton in the county of Sussex, in England, declare this to be my last Will, which I make this 3rd day of June, 1890, so far only as is hereinafter declared:—

"1. I hereby devise all my lands, warehouses, buildings, and premises situate in the City of St. Petersburg, in the Empire of Russia, and all other (if any), my lands and other real and immoveable property situate in the Empire of Russia, unto my friend Alexander Miller Hallett of Norway Wharf, Rotherhithe Street, London, and my son, Richard Wm. Tamplin, at present

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residing in St. Petersburg, aforesaid, in equal shares. And I hereby institute them my heirs in respect thereof.

"2. I declare that this will shall not affect any property of mine whatsoever except my said lands and other real and immoveable property situate in the Empire of Russia.

"In witness whereof I, the said Wm. Cloves Tamplin, being of sound mind and good memory, have hereunto set my hand the day and year first above written.

"Signed and acknowledged by the above-named William Cloves Tamplin (he being at the time of signing of sound mind and good memory) as his Will relating to his lands and other real and immoveable property in Russia; in the presence of us, present at the same time, who, at his request, in his presence and in presence of each other, hereunto subscribe our names as witnesses. } William C. Tamplin.

"Ben. Jas. Crook } Clerks to Messrs. Bevan & King, 40,
"Fred. W. Burt } Chancery Lane, W.C., Solicitors.
"John C. Day, 40, Chancery Lane, Housekeeper."

All the executors and trustees, including the son, now applied for probate of the will of August 1, 1889, together with the two codicils of February 14 and June 2, 1890, and the deed of covenant of May 16, 1890, and the Russian will of June 3, 1890.

Bayford, Q.C., and *Barnard*, (*P. S. Gregory*, with them), on behalf of all the executors and trustees. The second codicil incorporates the deed of covenant, because, although it recites the effect of the deed, the Court would not be satisfied with a recital, but would require that the deed itself should be brought in and included in the probate. If some one should hereafter dispute that the property is settled in the manner recited in the codicil, a difficulty might arise, especially if the original deed

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of covenant were lost, if there were nothing on the face of the probate to shew that the property was, in fact, settled in the way recited in the codicil. The codicil does not leave the property to be dealt with in the particular way; it only recites that the deed of covenant leaves the property to be dealt with in that way.

[GORELL BARNES, J. Is it necessary to incorporate the deed of covenant?]

The deed would be binding on the parties. Probate is also sought of the will of June 3, as forming part of the whole will of the testator.

[GORELL BARNES, J. But it does not dispose of anything in this country.]

That is immaterial. It would be most convenient to take probate here of all the five documents. The Court has to consider what is the real will of the testator. Even where the Court has granted probate of separate documents, it has never made such an order without making it appear on the face of the probate that there was another will of the deceased, dealing with other property in a different country, so that any one who saw the will might at once have notice that the document of which probate had been granted was not the whole will of the testator.

The first case in which separate wills, dealing with property in different countries, were recognised was *In the Goods of Nickalls*. (1) The cases in which probate of separate wills has been granted are first, *In the Goods of Astor* (2), in which, for the first time, the Court departed from the general rule of insisting upon the whole of the testamentary papers of the deceased being included in the probate. In that case, if the English executor had asked that probate of all the documents should be granted to him, the concluding words of Lord Hannen's judgment shew that the whole will would have been included in the probate.

[GORELL BARNES, J. Supposing there were a simple document, by itself, disposing only of property in Russia, that would not be admitted to probate.]

If the will and three of these documents only are to be

(1) 4 Sw. & Tr. 40. (2) 1 P. D. 150.

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admitted to probate, there will be probate of a will, dealing with English and Russian property; and a document in which the testator has gone on to deal with other Russian property will be excluded. All the documents ought to be admitted to probate. Again, unless the deed is incorporated, the general trustees may never get the proceeds of the Russian property. Where the Court finds a document shewing how the testator had arranged with certain persons to carry out his wishes, that document ought to be incorporated with the will. Otherwise, it might be lost, and there would be no certainty that what is recited in the codicil is what was really intended to be done. *In the Goods of Callaway* (1) is to the same effect as *In the Goods of Astor* (2); and *In the Goods of De la Rue* (3) was decided on the same principle. In all those cases the application was for the same indulgence, namely, that the foreign will should not be included in the probate of the English will. The Russian will has not been executed according to Russian law; but it is thought that, if admitted here, as the testator was a domiciled British subject, the probate might be recognised in Russia as covering the realty as well as the other immoveable property in that country. *In the Goods of Bolton* (4) was a case in which the testator was domiciled in Belgium, and two wills were admitted to proof. Here, however, the testator was domiciled in England and the Russian will was executed in accordance with English law. Under these circumstances, this Court will not call for evidence as to whether the Russian will was made according to Russian law or not; but, seeing that it is duly executed here, will grant probate of it. Upon the authorities, the practice of this Court is to grant probate of all the documents which make up the will of the deceased, and the later cases only shew, that, where an indulgence is granted by allowing only a portion of the testamentary papers to be included in the English probate, the Court then requires that, upon the face of the probate, there should be inserted a notice of the existence of other testamentary papers of the deceased, so that any one looking at the probate may at once be apprized of the existence of such other papers.

(1) 15 P. D. 147.
(2) 1 P. D. 150.
(3) 15 P. D. 185.
(4) 12 P. D. 202.

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IN THE GOODS OF TAMPLIN, DECEASED.

1893. Dec. 2. GORELL BARNES, J. In this case the question raised before me was, whether all or only some of certain documents ought to be admitted to probate. Counsel ask for probate of five documents, the effect of which seems to me to be as follows: First comes a will disposing of all the testator's property, and a codicil to that will, which, however, does not, I think, touch this question. Then, apparently, being advised that his will, as framed, would not be operative upon his Russian property unless it complied with the laws of the Russian Empire, the testator, by his second codicil, revoked all his previous dispositions, so far as they related to his real and immoveable property in Russia; his intention and wish being, that the arrangement made with his son and Mr. Hallett that they should sell his real and immoveable property in Russia and hand the proceeds over to his general trustees in England, should be carried into effect, and, that he should devise his real and immoveable property in Russia to those two gentlemen absolutely, so that they should be able to obtain possession of the property and sell it, and should remit the proceeds to this country, as arranged. It is the will of June 3, 1890, and the deed of covenant which give rise to the difficulty. I am asked to admit them to probate as forming part of the will of the testator, which, taking it as a whole, ought, it is contended, to be admitted. It seems to me that the matter must be looked at in this way. If the last will of June 3, 1890, which deals only with real and immoveable property in Russia, were alone put forward for probate in this Court, it is tolerably clear that probate of it would not be allowed. I asked counsel who argued this case, whether they could cite to me any case in which a will dealing only with real and immoveable property in a foreign country had been admitted to probate in this Court. Counsel were unable to cite any such case; and, so far as I have been able to ascertain, there is no case in which that has been done; and it would seem, indeed, that this must be so, looking to the principles by which this Court is governed in dealing with the wills of persons who die possessed of property in other countries. In *Freke* v. *Lord Carbery* (1), Lord Selborne

(1) Law Rep. 16 Eq. 461.

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(at p. 466) says: "The passage which Mr. Fry quoted from Story . . . . is simply a translation into the phraseology of the English law of the maxim of the general law, mobilia sequuntur personam, and is certainly not meant to apply arbitrarily in a new sense, because Lord Loughborough used the word 'personal' instead of 'moveable.' The doctrine depends upon a principle expressed in the Latin words, and that is the only principle of the whole of our law as to domicil when applicable to the succession of what we call personal estate. It is so, not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally. Domicil is allowed in this country to have the same influence as in other countries in determining the succession of moveable estate; but the maxim of the law of the civilized world is mobilia sequuntur personam, and is founded on the nature of things. When 'mobilia' are in places, other than that of the person to whom they belong, their accidental situs is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable and not moveable. The doctrine is inapplicable to it, and Story . . . . manifestly recognises that, where he says that all lands and all houses are necessarily immoveable; and then he speaks of their universally partaking of the law of immoveable property, or 'property savouring of the realty'—language which must be used with respect to an interest less than fee simple, and less than what we call freehold; because, to speak of a thing 'partaking' or 'savouring' implies that, by the positive law of the country, they also are made to partake and savour in some respects of a law not applicable to all kinds of immoveable property." There are other cases in which the same class of observations are to be found, and it seems to me, when those cases are considered, and in the absence of any authority in favour of such a document as this last one being admitted to probate, that the ground upon which the principle is founded is this: With regard to real and immoveable property in a foreign country, that must follow the law of that foreign country, and cannot come in

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as forming part of the personal estate of the deceased, and probate of a will of that property cannot be granted. Then it is said that the whole five documents ought to be embodied in the probate, as forming together one whole will of the deceased. If I could adopt that view of the matter, I should think it would be of some advantage that this should be done. It seems to me, however, when the whole of the documents are considered, that the testator himself did not really intend that to be the state of things, but intended rather, when it is looked at as a matter of common sense, that his will and two codicils should be the operative documents in this country, that the document which is called the Russian will should be put in force in Russia, and, that the trustees of the Russian property should hand over the proceeds thereof to his general trustees in England. The testator did not intend that the whole of the five documents should be admitted to probate in this country. The will of June 3 and the deed of covenant are really independent of the other three, and, after consideration of this case, I have come to the conclusion that it would be an erroneous view to take, if I were to say that the will of June 3 and the deed of covenant form part of the whole will of the testator, and ought to be admitted to probate on that ground. Were I so to hold, it seems to me that I should, as I pointed out in the course of the argument, be saying, in effect, if a man were to make a will dealing simply with personal estate in England, and then were to make another will, dealing only with real estate in England, that, because those two documents formed together a disposition of the whole of his property, they ought both to be admitted to probate. No case can be cited to that effect, and, under the circumstances, I have come to the conclusion that in this case I ought not to allow probate of the Russian will or of the deed of covenant. With regard to the other documents, I understand that the testator died possessed of very considerable real and personal property in England, with which the will and first and second codicil deal. My order had better be simply that the will of June 3 and the deed of covenant are not to be included in the probate. I make the order in that form, because a point was raised before me as to a possible dependent relative

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revocation, and the parties might desire to consider their position, in view of the decision which I have now arrived at. The matter strikes me as being of importance, and, it may be, that the parties will desire to question my view as to the last two documents, before wishing to raise any point of dependent relative revocation.

[Probate of the will of 1889 and the two codicils of February 14, 1890, and June 2, 1890, was taken by the executors on December 13, 1893.]

Solicitors: *Bevan & King.*

W. L.

C. A.

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Nov. 24, 25.

[IN THE COURT OF APPEAL.]

THE GLENLIVET.

Admiralty—Ship—Marine Insurance—Loss by Fire—Memorandum in Lloyd's Policy—"Free from average under 3 per cent., unless general, or the Ship be . . . . burnt."

A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk or burnt"—unless the injury by fire is such as to constitute a substantial burning of the ship as a whole.

APPEAL by plaintiffs, the Glenlivet Steamship Company, Limited, against a decision of Gorell Barnes, J., dated March 21, 1893, in favour of the defendant, John Henry Titcombe, an underwriter at Lloyd's.

The action was brought to recover the defendant's proportion of claims made by the plaintiffs upon their insurers under policies on the *Glenlivet*, and the question raised was as to the construction to be placed on the word "burnt" in the memorandum commonly used in a Lloyd's policy. The case is fully reported in the Court below (1), but the following is a summary of the material facts:—

The *Glenlivet* was insured at certain valuations of the hull and materials, machinery and boilers, for twelve calendar months,

(1) [1893] P. 164.

under a policy dated August 26, 1891, commencing August 29, and from August 29, 1892, for a similar period under another policy dated August 25 of that year. These policies contained the usual memorandum printed in a Lloyd's policy, viz.: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded: sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded"—added in writing —"sunk or burnt"; and there was also added in writing: "The warranty and conditions as to average under 3 per cent. to be applicable to each out and home voyage as if separately insured and not to the whole time insured."

Fires occurred on board the *Glenlivet* on three several and separate voyages, which, for purposes of convenience, were described as No. 1, No. 2, and No. 4 voyages.

The claim on the first voyage was for a small average loss under 3 per cent. from perils other than fire; and on the second and fourth voyages for small average losses to the vessel herself under 3 per cent., partly from fire and partly from other perils insured against.

The details as to the fires were shortly as follows:—

On May 6, 1892, during voyage No. 1, the cross-bunker was observed to be on fire owing to the coals having heated. Part of the coal was discharged, and the fire put out by pumping water on it. On May 29 the port bunker was observed to be on fire, but it was put out by pumping water on it. There was no damage to the ship's structure.

On July 26, during voyage No. 2, the starboard bunker was found to be on fire. Coal was worked out of it, and water pumped down to put it out, the deck hose being burnt in so doing. On the following day a fire was found to have broken out again in the starboard bunker. The coal was trimmed, water pumped down, and the fire put out in about four and a half hours. There was some damage to the plating of the ship, as, according to the surveyor's report after the voyage, it was found that the "second strake-plate of bunker 'tween deck abaft bunker hatch

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was buckled downwards, the angle iron round bunker hatch buckled, the plating of bunker side and main shell plates and frames for 12 ft. with paint burnt off, coals in side bunkers required to be removed to effect the repairs, estimated about ten tons of coals destroyed. Saw some of the coals which had been fired converted into coke."

On October 14, during voyage No. 4, the cross-bunker was found to be on fire, but it was extinguished in an hour with the aid of the crew drawing water with buckets, there being some injury to the ship's plating, as it was stated in the surveyor's report that: "One plate and angle bar in cross bunker (hatch bulkhead) buckled and broken, riveting started, brick and wood casing destroyed; also four hatches and one fore and after Donkey funnel damaged, buckled, and bent."

In the Court below Gorell Barnes, J., gave judgment for the defendant, holding that the ship had not been "burnt" within the meaning of the memorandum in the policy, as the injury by fire must be "sufficient to cause some interruption of the voyage, so that the vessel is, pro tempore, incapable of being properly used for the purposes of her voyage"; that is, when the ship is "temporarily innavigable."

Aspinall, Q.C., for the appellants (plaintiffs). The primary meaning of the word "burnt" is, no doubt, total consumption; but in the case of an iron ship with iron decks, it could hardly be said, under any circumstances, that she was "burnt" in that sense, though the plates under the influence of heat will buckle, as occurred in this case on the second and fourth voyages.

The test adopted by the learned judge in the Court below, viz., that the ship must be "temporarily innavigable," must also fail, because a vessel, for example, in the Irish Sea, in a strong westerly gale, might be unable to go to Dublin on account of the head wind rendering the fire unmanageable and therefore the ship unnavigable, but, if turned round towards Holyhead, she might be able to navigate without difficulty whilst the fire was being got under.

In the case of stranding, sinking, or burning, it is the imminent danger of greater loss to the underwriter, if a reasonable

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inducement is not held out to the master to take energetic steps to prevent, if possible, any increase in the damage, that has led to the agreement to cancel the 3 per cent. warranty. From this point of view, if substantial damage is necessary, the exception in the policy is meaningless, and if the damage need not be substantial, then any fire which would, if continued, burn the ship is sufficient, that is, if some part of the fabric of the ship is "burnt" or risk occasioned by the burning to the structure of the ship, not simply a burning of fittings, as, for example, the cabin curtains, though a burning of the stores would suffice, as the stores are part of the ship: *Hill* v. *Patten* (1); *Forbes* v. *Aspinall.* (2) [The following decisions on the word "stranding" in the memorandum were referred to as illustrating the meaning to be attached to the word "burnt": *M'Dougle* v. *Royal Exchange Assurance Co.* (3); *Wells* v. *Hopwood* (4); *Harman* v. *Vaux* (5); *Kingsford* v. *Marshall* (6); *Burnett* v. *Kensington.* (7)]

Joseph Walton, Q.C., for the respondent (defendant). The memorandum was primarily inserted in favour of the underwriter to exclude small claims on goods, then the words "unless," &c., were added to let in small damage in favour of the assured whether before or after the stranding, sinking, or burning, so as to avoid an elaborate inquiry into the cause of the damage; but whatever the ground of the exception, the question whether a ship is "burnt" must finally resolve itself into one of fact, and, though the test of the ship being "temporarily innavigable" may be too narrow, there can be no doubt that if this case had been submitted, according to the ordinary procedure, to a special jury, they would, after the presiding judge had directed them as to the question to be answered, have found, as the learned judge in the Court below has found, that this ship was not "burnt."

It is not necessary to go so far as to insist upon total destruction or total annihilation, but it is submitted that in order to

(1) 8 East, 373.
(2) 13 East, 323, at p. 325.
(3) 4 M. & S. 503.
(4) 3 B. & Ad. 20.
(5) 3 Camp. 429.
(6) 8 Bing. 458.
(7) 7 T. R. 210.

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satisfy the meaning of the word "burnt," so as to delete the warranty, there must be a substantial burning of the ship.

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LINDLEY, L.J. This is an appeal from the decision of Barnes, J., the action being brought by a shipowner against the insurer upon a Lloyd's policy, with one or more verbal alterations.

The policy is in the form used for ship or goods; the perils insured against are the ordinary perils, including fire. There is the ordinary memorandum about corn, fish, and so on, and "all other goods, also the ship and freight are warranted free from average under 3 pounds per cent., unless general, or the ship is stranded." That is printed; then there is added "sunk or burnt," so that it runs thus: "All other goods, also the ship and freight, are warranted free from average under 3 pounds per cent., unless general, or the ship is stranded, sunk, or burnt"; and we have to consider whether this ship has been "burnt" within the meaning of the expression there used.

Now, the facts are not in dispute. There was a fire on board this ship in one of the coal-bunkers, and the fire was so severe that some damage was done to the structure of the ship; it is unnecessary to particularize it, but a plate got cracked and some angle-irons got bent. The ship was an iron ship; how much wood was on board I do not know; but it is sufficient to say that the fire clearly injured the ship.

Now comes the question whether this ship was "burnt" within the meaning of that expression. Barnes, J., has held that it was not; and in my opinion that is obviously right. I say "obviously," because we must look at this word "burnt" in reference to the context: it is part of a phrase "unless the ship is stranded, sunk, or burnt." What does that mean? I take it the context shews that what is meant is that the ship as a whole must be stranded, sunk, or burnt, and I cannot accept the construction or suggestion of the plaintiffs' counsel that any fire on board a ship, doing a little structural damage to the ship itself, is a burning in ordinary language. It appears to me it is not so. In the course of the argument cases have been put of a fire on board ship extinguished before any substantial damage has been done; can you

say the ship is burnt? Of course in one sense it is burnt: anything that burns any part of a ship is a burning of the ship; but I cannot think that is the meaning of it here; and if this case had been tried before a special jury, I should have thought the duty of the judge would have been to give the jury a direction to this effect: "Although there is a fire on board the ship, and the ship is injured, that is not necessarily enough; you must ask yourselves whether the ship was in fact burnt."

Although it is extremely difficult to draw the line, yet in ninety-nine times out of a hundred you can see on which side of the line a case falls. If you ask anybody to draw the line between light and shade when they fade off from one to the other, he cannot do it; but one can often see plainly enough whether an object is in light or shade, and many cases may be practically dealt with in that way.

I do not pretend to draw the line; but I can see as plainly as any juryman, or as any ordinary man would see, that this ship has not been burnt. There has been some damage done; but the ship has not been burnt. That appears to me the true construction of this policy.

The point is new. I agree it is very important, not only to persons interested in policies on ships, but particularly to those interested in policies on goods. The difficulty arises from the habit of business men of adding to an existing form of document a few words to express what they mean. The instrument as a whole is not re-cast as a conveyancer's draft is. That is not in accordance with the habits of business men, and I dare say that counsel for the defendant is quite right in saying they cannot do it. They put in a word. We have to make out what the word really means.

Difficulties have been suggested on both sides. I think there are difficulties; but the difficulties are fewer on one side than the other, and the construction, which I think is the true one, meets more difficulties than any other.

If the ship is so much affected by the fire as, in popular language, to be burnt, one sees the consequences. It is said that if this view is to prevail, the words would have some operation as regards goods, but would have no operation as regards ship.

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Counsel for the defendant has answered that by pointing out the effect it would have on other small damages to the ship. What I have stated is to my mind the clear meaning of the expression, when you take the word "burnt" in connection with "stranding" and "sunk." This appeal must be dismissed with costs.

A. L. SMITH, L.J. I think the judgment of my brother Barnes was unquestionably correct; but, whether the direction which he gave himself was accurate, is a question of some difficulty, which I will deal with.

Now, the action is brought by an assured upon a policy insuring his ship in the old form of Lloyd's policy, which has been in vogue for 150 years or more, with some additions. The clause in question runs as follows: "And all other goods, also the ship and freight are warranted free from average under 3 per cent. unless general, or the ship be stranded sunk or burnt"—"sunk or burnt" have been added more recently—my brother Barnes says about thirty years ago. Carrying my memory back, I cannot say whether in the beginning of my time the memorandum stopped at "stranded"; I think not, but, during the greater part of my time, it undoubtedly has been "stranded sunk or burnt."

Now comes the question, What is the meaning of the word "burnt" in the memorandum? There have been numerous decisions as to what is the meaning of "stranded"; but there have been no decisions as to the meaning of "sunk" or "burnt," and I believe this is the first time that the word "burnt" has come up for decision.

The upshot of the many cases upon stranding is that, if a ship touches and goes, she is not "stranded," if she touches and sticks, she is, that is, in places in which she, in the ordinary course of her navigation, is not suffered to touch.

As regards the burning which did take place upon this ship, there was damage by fire to the ship on two of the voyages more or less (rather less than more), and the question is, in these circumstances, was the ship "burnt" within the memorandum?

Now, it has been argued on behalf of the plaintiffs that any

burning (cabin curtains, for instance) of the ship is sufficient to delete the warranty.

I do not think that this is so, and if this case had been tried before a jury in the ordinary way (although I quite agree that it was tried in a very proper way), the learned judge would have had to direct the jury as to what was or was not a burning so as to constitute a "burnt" ship. He would, in my judgment, have had to tell them that a partial burning of the ship did not necessarily constitute a "burnt" ship. He would have given them this direction because of the controversy which had arisen at the bar before him. He would also have said that it might do so, but that it would depend upon the character and nature of the partial burning of the ship. Let me put what I mean. Suppose the cabin curtains were burnt, he should have told the jury that that did not constitute a "burnt" ship; but suppose the after part of the ship was burnt altogether, and the fore part was not burnt at all, I think he should have told them that they might if they liked find that was a "burnt" ship, although there was only a partial burning.

It seems to me impossible to lay down absolutely in the affirmative or the negative, as to whether a partial burning does constitute a "burnt" ship or not within this policy; it may or may not, according to the actual facts appertaining to the partial burning.

I now come to the suggestion of the counsel for the plaintiffs, that it means the initiation of such a fire as, unless it were put out, would consume the ship. I cannot think that this can be the meaning, for there could hardly be a fire which, if not put out, might not consume a ship. If the cabin curtains caught fire and it was not put out, that might end in the destruction of the ship. Therefore that proposition will not do.

Then I come to the suggestion of my brother Barnes, which is that it must be a burning such as to render the ship "temporarily innavigable." I do not think that this is right, because, supposing there was such a burning as only to stop the ship for half an hour—suppose the ship was steered by rudder-cords instead of by chains, and the rudder-cords were burnt and the ship stopped for half an hour—would you call that a "burnt"

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ship? I should not; but that would come within my brother Barnes' definition of being "temporarily innavigable" whilst the rudder-cords were being adjusted. I cannot think that this direction is right.

My own view is that you would have to tell the jury what I have already said about partial burning, and then you would have to tell them that a partial burning may, under some circumstances, constitute a "burnt" ship, and may not under other circumstances, and having given that direction you would have to ask them, Has the fire been such as to bring the ship to such a condition that you consider her a "burnt" ship within the ordinary meaning of the English language?

This in my judgment is the nearest direction which can be given as to what is meant by a "burnt" ship in the memorandum; it is not possible to lay down any hard and fast rule upon the subject.

My brother Barnes was clearly right in the result of his judgment, but I think he put too narrow a construction upon the word "burnt."

DAVEY, L.J. I approach the consideration of this question with an entirely open mind, and the question I ask myself is, whether upon the facts this ship has been "burnt" within the meaning of the policy.

I can find nothing in the policy to satisfy me that the words are intended to be used otherwise than in accordance with the ordinary use of language. Counsel for the plaintiffs says that the clause applies if a fire breaks out in any part of a ship or stores, although it is got under before any great amount of damage is done to the ship.

I cannot bring myself to think that any person would, either in the accurate use of language, or in ordinary parlance, say that in such a case as that the ship has been "burnt."

Counsel for the plaintiffs further says that the clause, or rather the exception, would have no meaning, as applied to the ship, unless you adopt the construction which he invites us to put upon the word; but, in my opinion, that suggestion or argument has been answered by the counsel for the defendant,

that it would have the effect of bringing within the ambit of the policy, or taking out of the exception in the memorandum, small damage not amounting to 3 per cent. which had been previously done to the ship.

Remembering, therefore, that this clause has been construed as a condition, and that it is not for the mere purpose of excepting from the memorandum damage by fire, I answer the question by saying that the condition has not in my opinion arisen, because the ship has not been "burnt" within the meaning of the policy.

I agree with A. L. Smith, L.J., that it may be exceedingly difficult to put (and I do not know that it is very useful to attempt to put) into a definition every case in which a ship could be "burnt." I also agree that Gorell Barnes, J.'s, definition is open to criticism; but I think that it is really a question to be answered by the jury, Has the ship in the circumstances of this case been burnt? I am, therefore, of opinion that this appeal fails.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Botterell & Roche.*

Solicitors for respondent (defendant): *Waltons, Johnson, Bubb, & Whatton.*

T. L. M.

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[IN THE COURT OF APPEAL.]

THE INDUSTRIE.

Admiralty—Ship—Charterparty—Construction of Written Document—Carriage of Goods—Sale at Port of Distress—Freight—German Law.

By a charterparty, on an ordinary English printed form, negotiated and made in London between the London broker of the plaintiff, a German shipowner domiciled in Germany, and the defendants, merchants in London, it was agreed that the plaintiffs' ship, which was under German colours, with a German master, and then in a French port, should proceed to Akyab, Rangoon or Bassein, according to orders, and there load, from the defendants' agents, a cargo of rice, and being so loaded proceed to Scilly, Falmouth, Plymouth, or Cowes, for orders to discharge in the United Kingdom or on the Continent between Havre and Hamburg, "freight being payable at and after the rate of 35*s.* sterling per ton of 20 cwt. net delivered. . . . The Act of God, the Queen's Enemies, Restraints of Princes and Rulers, Fire, and all and every other Dangers and Accidents of the Seas, Rivers and Navigation of whatever nature and kind soever, during the said Voyage, always excepted. . . . The freight to be paid on right delivery of cargo if discharged in the United Kingdom; in cash as customary . . . and if on the Continent, in cash at the exchange of the day of final discharge without discount."

The vessel proceeded to Bassein, and there loaded a cargo of rice belonging to the defendants, the master signing a bill of lading making the rice deliverable to the defendants' order, freight and all other conditions as per charterparty. On the voyage the vessel met with heavy weather, and her master, for the safety of ship and cargo, put into Port Elizabeth, where a portion of the cargo was found to be so much damaged by sea-water that, on survey, it was condemned as unfit for reshipment and sold by the master.

The plaintiff sued the defendants for full freight on the portion of the cargo so sold at the port of distress:—

Held, by Gorell Barnes, J., that the defendants were liable, as the parties must be taken to have intended that the law of the flag should apply to the contract and—in the absence of any express provision in the charterparty dealing with the circumstances which had arisen—German law supplemented the contract, and made full freight payable on the portion of the cargo so sold:

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reversing the decision of Gorell Barnes, J., that the defendants were not liable, as the intention of the parties was to make an English contract, and, the payment of freight being expressly dealt with in the charterparty, none was payable on the portion of the cargo sold in the port of distress.

Appeal by defendants against a decision of Gorell Barnes, J., in favour of the claim of the plaintiff, the owner of the German

ship *Industrie*, for 121*l.* 13*s.* 3*d.*, full freight on 746 bags of sea-damaged rice, belonging to the defendants, and sold, in a port of distress, by the master of the ship.

The facts, so far as material, were briefly as follows:—

On July 29, 1891, after negotiations in London, a charterparty was entered into—in the English language, on one of the ordinary printed forms used by the defendants in their business, and signed in London by the defendants, Steel Brothers & Co., Limited, merchants of London, as charterers, and Lloyd Lowe & Co., who carry on business in London, and were acting as brokers for Carl Winters, one of the owners of the ship, a German subject domiciled at Elsfleth in Germany, but from time to time in this country on business—by which the *Industrie*, described as under German colours with Kirchhoff as master, now at Rouen, was, after discharging outward cargo, to proceed "to off Akyab, Elephant Point for Rangoon, Diamond Island for Bassein, for orders . . . to load at Akyab or at Rangoon or at Bassein . . . from the agents of the freighters . . . a full and complete cargo of cargo rice $\frac{\text{and}}{\text{or}}$ cleaned rice $\frac{\text{and}}{\text{or}}$ broken rice in bags not exceeding 2250 tons net intake weight, . . . and being so loaded . . . proceed to Scilly, Falmouth, Plymouth or Cowes . . . for orders . . . to discharge . . . in the United Kingdom or on the Continent between Havre and Hamburg. . . . Freight being payable at and after the rate of 35*s.* sterling per ton of 20 cwt. net delivered . . . but . . . charterers to have the option on presenting bill of lading for signature to order the vessel to a direct port at a reduction of one shilling and threepence per ton on the chartered rate of freight. The ton of 20 cwt. net to be reckoned at 1016 kilos if discharged elsewhere than in the United Kingdom. The act of God, the Queen's enemies, restraints of Princes and Rulers, Fire, and all and every other dangers and accidents of the Seas, Rivers, and Navigation of whatever nature and kind soever, during the said voyage, always excepted. . . . The freight to be paid, on right delivery of cargo if discharged in the United Kingdom; in cash as customary . . . and if on the Continent, in cash at the exchange of the day of final discharge without discount . . . the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the

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freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, and any other claim they may have under this charterparty, which lien they shall be bound to exercise."

On April 5, 1892, the master signed a bill of lading in English at Bassein for 22,909 bags of rice each weighing 220 lbs. net equal to 2249 : 19 : 3 : 8 tons deliverable to the defendants' order and freight, and all other conditions to be as per charterparty.

The bill of lading was not indorsed, and the rice always remained the property of the defendants, so that their liability continued, notwithstanding the cesser clause in the charterparty.

On April 8, the *Industrie* sailed from Bassein, for the English Channel for orders, with the cargo of rice shipped by the defendants, but, meeting with heavy weather, 141 bags were jettisoned, and her master, on July 1, for the safety of ship and cargo, put into Port Elizabeth, Algoa Bay, where 3775 bags of rice were landed, having been damaged by sea-water which had got into the vessel.

Of these bags of rice, 746 were found to be so much damaged by sea-water that they were, on survey, condemned as unfit for reshipment, as (according to the admission of facts) "if reshipped, and carried forward they would have become destroyed and worthless before they could have arrived at any destination under the charterparty." The master sold this damaged rice and applied the proceeds towards his disbursements at Port Elizabeth.

The remaining 3029 bags were reshipped—1091 of them in a more or less damaged condition—and the repairs having been completed, on August 9 the surveyors reported that the *Industrie* was fit to proceed to sea. She received orders at her port of call, and delivered her cargo in Liverpool, where an adjustment of general average was completed, which took into account the freight on the jettisoned bags. The remainder of the freight was collected from the consignees, except that on the cargo sold at Port Elizabeth, which was the subject of the present action.

1893. June 19, 20. The case was argued on a written admission of facts (the contents of which have been already

summarised), to which was annexed the charterparty, and bill of lading. The statement concluded with the following paragraph:—

"It is also agreed that for the purpose of shewing what is the law of Germany applicable (if at all) to the case, either side may refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August* as reported in the LAW REPORTS." (1)

Joseph Walton, Q.C., for the plaintiff, the owner of the ship *Industrie*.

Carver, for the defendants, the owners of the cargo sold at Port Elizabeth.

The arguments of counsel fully appear from the following extract from the judgment of—

1893. July 11. GORELL BARNES, J. The first question to determine is whether the contract is English or German. The defendants say that the charterparty, being made in England on an English form, was an English contract, and as, according to English law, the freight on the 746 bags of rice, sold in the port of distress, would not be recoverable, not even pro rata freight, the case of the plaintiff fails.

The plaintiff does not dispute that, if the contract is English, he is not entitled to sue; but he contends that as this contract was made by a German shipowner, domiciled in Germany, (though made through his agent), for the employment of a German ship on an ocean voyage, the contract must be treated as a German contract in accordance with the decisions which have been given in the Courts.

I think it is unnecessary to deal with those decisions at any length, because they have been reviewed by Lord Hannen very fully in the case of *The August*. (1) The cases referred to by him are *Lloyd* v. *Guibert* (2), *The Gaetano and Maria* (3), and *Chartered Mercantile Bank of India* v. *Netherlands India Co.* (4); and although the point in the case of *The August* (1) was not

(1) [1891] P. 328.
(2) Law Rep. 1 Q. B. 115.
(3) 7 P. D. 137.
(4) 10 Q. B. D. 521.

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distinctly whether or not the contract itself was a German contract, but whether or not the master of the *August* was entitled to act in conformity with the law of the flag of the ship, or only in conformity with the English law, the judgments to which Lord Hannen refers, I think, cover the point of the contract as well as the other point. . .

The effect of the judgment (of the Master of the Rolls in the *Gaetano and Maria* (1)) and Lord Hannen's judgment, is to confirm what was said by Willes, J., in *Lloyd* v. *Guibert* (2), and, although I am correct, I think, in saying that in both these cases the contract was made by the master, Willes, J., in *Lloyd* v. *Guibert* (3) says, in effect, as I read his language, that it makes no difference whether it was made by the master himself or by the owner. . .

I noticed that in the course of the argument it was stated that the charter in *Lloyd* v. *Guibert* (2) was in a French form; but I have myself been unable to find where that suggestion comes from, unless it is from the passage in Lindley, L.J.'s, judgment, in *Chartered Mercantile Bank of India* v. *Netherlands, &c., Co.* (4) The language used in the pleadings, I should have thought, rather led to the inference that the charter was in fact in an English form, because it expresses that it was for a voyage from St. Marc in Hayti to Havre, London, or Liverpool, at the charterers' option, and there is no indication given of that contract being in the French form.

The effect of those cases, and especially of *Lloyd* v. *Guibert* (2), is that, in the charter of a foreign ship the convenience of commerce and the desirability of having some certain rule upon which to act require that, unless there is something in the contract to shew the contrary, the law of the flag should prevail. . .

No doubt it is a question of intention. Counsel for the defendants asks me to infer the intention that it was an English contract because it was made in England and made on an English form. The plaintiff, on the other hand, asks me to treat it as coming under the general rule and affirming an

(1) 7 P. D. 137.
(2) Law Rep. 1 Q. B. 115.
(3) Law Rep. 1 Q. B. 115, at p. 122.
(4) 10 Q. B. D. 521, at p. 540.

intention that it should be a German contract, because it was, in fact, made by the German owners of a German ship which must sail under a German master, and because, in the course of that voyage, a German master must have to act in accordance with the law of his flag in such circumstances as arose in the case of *The August* (1), and therefore there was nothing to shew that the intention of the parties was other than—and that I ought to infer that it was in fact—an intention to apply the law of the flag to this contract.

In my judgment, I think that view is correct, and that the contract ought to be treated in this case as governed by the German law.

The second point raised by the defendants is that, even if the contract is governed by German law, inasmuch as it only provides for the payment of freight on delivery, it is in its terms inconsistent with the application of any provision that freight should be payable in such a case as this, and that as the contract itself provides for the cases in which payment is to be made, no other freight is properly to become payable under the circumstances.

I do not think that this is a true conclusion to arrive at. I have looked through the translation of the German code in Dr. Wendt's book (2), and it will be found there, in numerous sections, that the scheme of the code would seem to be to allow the parties to contract in such way as they please, and then to provide for matters which they have left undealt with. One meets with the term in the code, "When no agreement to the contrary has been made," then such and such consequences should follow.

It seems to me, therefore, that it may well be that, if the contract deals with certain specific payments on delivery and so forth, it may be supplemented by the provisions of the code, where the parties have not themselves made any particular bargain upon the subject.

The third and last point raised before me was: whether or not full freight is payable by the German law under such

(1) [1891] P. 328.

(2) Papers on Maritime Legislation, by E. E. Wendt, 3rd ed. 1888.

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circumstances as these—namely, where cargo is discharged at the port of refuge into which the vessel puts for repairs, and is necessarily sold, or justifiably sold, because its condition requires it.

I confess that, unaided, I should have felt very great doubt as to what was the German law upon this point.

After reference to the articles of the code which relate to this subject—viz., articles 638 and 640 (1)—I should have felt some doubt as to the construction to be put upon them, though my inclination would have been in favour of the plaintiff's contention; but the parties have been good enough to relieve me from difficulty. In the case of *The August* (2), in which I was engaged as counsel, Mr. Hermann Hildebrand, a German advocate practising at Bremen, was examined, and I am sure no one who was present in Court when he was examined can fail to have been impressed with the extremely able manner in which he gave his evidence; and Lord Hannen, in referring to his evidence, says (3): "I may add that Mr. Hildebrand appeared to me to give his evidence with intelligence and candour, and without bias in favour of the party by whom he was called"; and although the agreement between the parties in this case at first was that either side might refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August* (2) as reported in the LAW REPORTS, it will be found upon reference to that report that Mr. Hildebrand's evidence in connection with freight is not set out in consequence of the fact that after hearing his evidence I, as counsel for the

(1) The material portion of these sections of the German code of mercantile law is thus translated by Dr. Wendt:—

Art. 638. ". . . When the incident occurs after the commencement of the voyage, the charterer shall pay the full freight for such portion of the cargo as is concerned therein, even when the master has been compelled to discharge such portion in a different port from the port of destination, and when he has subsequently continued the voyage with or without delay. . . ."

Art. 640: "In case the vessel must be repaired during the voyage, the charterer may, at his option, either take delivery of the whole cargo at the place where the vessel is staying, on paying the full freight and the other claims of the shipowner (art. 615), and on paying or securing the claims stated in art. 616, or he may wait until the repairs have been completed. . . ."

(2) [1891] P. 328.

(3) [1891] P. 328, at p. 343.

plaintiffs, thought I could not maintain the opposite to what he had said in connection with the subject of freight. (1)

Now, I understand no shorthand note was preserved of his evidence; but I recollected that my junior at that time (Mr. Hollams) had taken a note of the evidence, and I have asked the parties to allow me to refer to those notes, and they have been furnished to me by both parties (2), and Mr. Hildebrand's evidence on the second head, viz., whether full freight would be payable is as follows—of course it is in the form of a note of the witnesses' evidence: "If condemnation justified then full freight would be payable"—he refers to article 504. (3)

"The master in selling is agent for cargo owner, and if owner had sold he would have had to pay full freight"; and he quotes the cases of *Maurice & Co.* v. *Perger & Co. on behalf of the Helvetia Insurance Co.* (4); *Lichtenberg* v. *Korner* (5); *Quincke* v. *Nord Deutscher Lloyd.* (6)

That was the evidence, and, according to the note, it appears that, after hearing it, I cross-examined him at length on the other parts of the case. The note proceeds thus: I said, "If German law applies and sale is justified, I do not dispute the payment of full freight."

It seems to me that that evidence covers the point in question, because the sale undoubtedly was justifiable by German law, and, therefore, according to this evidence the full freight will be payable.

I therefore hold that, in this case, there is a contract according to the German law, that that law will allow of the supplementing of the terms of the charter, where provision is not made in it, as

(1) See reporter's note at p. 348 of *The August*, [1891] P. 328.

(2) The agreement signed by the solicitors of the parties was in the following terms:—

"We consent that the note of Mr. F. W. Hollams on his brief of the evidence of Mr. Hildebrand in *The August* may be referred to by Mr. Justice Barnes in his judgment herein without prejudice to any question of costs."

(3) The material portion of Art. 504 of the German Code of Mercantile Law is set out in the judgment of Sir James (afterwards Lord) Hannen in *The August* [1891] P. 328, at p. 344.

(4) Kierulff's Decisions in the Lübeck Court of Appeal (1870), vol. vi. p. 350.

(5) Vol. xxv. of Decisions (1878), p. 6.

(6) Vol. xiv. of Decisions (1885), p. 34.

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to what is to happen at the port of distress, and that, according to that law, freight, under such circumstances as those in this case, would be payable in full on the cargo which was sold at Port Elizabeth.

My judgment must therefore be for the plaintiff with costs.

On appeal,

Carver, for the appellants (defendants). The learned judge in the Court below relied upon the cases cited by Lord Hannen in *The August* (1) as establishing the position that the contract in this case ought to be treated as governed by the German law. The question, however, in *The August* (1) was not whether the contract was German, but whether the master, in the emergency which had arisen, was entitled to act in conformity with the law of the flag of the ship; and it may well be that the master is entitled to deal with goods in a port of distress according to the only law he can be expected to know; but it does not follow that the effect of the contract as between shipper and shipowner is also to be determined by that law. In *Lloyd* v. *Guibert* (2) the judgment of the Court of Queen's Bench went upon the narrow ground that the French master of a French ship had only authority to bind his owners to the extent of the value of the ship and freight. It is true that in the Exchequer Chamber Willes, J., lays down the much broader rule stated in the judgment in that case (3); but it is submitted that the rights of parties to a contract are to be judged of by that law which they intended, or rather, by which they may justly be presumed to have bound themselves; and in the same judgment it is stated (4), "that the law of the place where the contract is made, is primâ facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention."

In *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.* (5), where a question arose as to the

(1) [1891] P. 328.
(2) 6 B. & S. 100.
(3) Law Rep. 1 Q. B. 115, at p. 129.
(4) Law Rep. 1 Q. B. 115, at p. 122.
(5) 10 Q. B. D. 521.

nationality of the carrying ship which had been in collision with another ship belonging to the same owners, the present Master of the Rolls (then Brett, L.J.) says (1): "It may be true in one sense to say that where the ship carries the flag of a particular country, primâ facie the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries, but that is not conclusive. The question what the contract is, and by what rule it is to be construed, is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties"; and then, after examining the facts, the learned judge continues: "It seems to me that upon taking these circumstances into consideration, the inference is irresistible that it was the intention of the parties that the contract should be an English contract, even though one considers the ship to have been a Dutch ship." And Lindley, L.J., says (2): "As regards the construction and effect of the contract itself as between the plaintiffs and the defendants there can, I think, be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd* v. *Guibert* (3), but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test."

In the present case the *Industrie* was at the time the charter-party was entered into in a French port. The document itself is in the English language on an ordinary printed form in use in England. The contract was negotiated and made in London, by two London firms, one being the defendants, the charterers, and the other the broker acting for the German owner, who was over in this country from time to time on business. The contract is for the ship to go and load at one of the rice ports and then proceed to an English port for orders, and those orders are to be sent from London, and the vessel in fact discharged at Liverpool. The expressions used in the contract are those customary in

(1) 10 Q. B. D. 521, at p. 529. (2) 10 Q. B. D. 521, at p. 540.
(3) Law Rep. 1 Q. B. 115.

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English charterparties, and they must be construed according to the meaning attached to them by English merchants. If the exception as to "the Act of God" is to be construed otherwise than as understood in England, great difficulties will arise as to the extent of the risk, as the meaning would vary according to the law applied: see per Cockburn, L.C.J., in *Nugent* v. *Smith* (1), where all the authorities are examined. The question in all these cases is one of intention, and the Court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed: *Missouri Steamship Co.* (2), where the exception "Queen's Enemies" was one of the circumstances relied upon to shew that the contract was English.

Secondly, the contract expressly deals with the question of freight, and excludes the interpretation put upon it in the Court below, because by English law no freight is payable under the circumstances of this case, and the only freight payable under the contract is 35*s.* sterling per ton of 20 cwt. *net delivered*—that is, at destination.

Thirdly, even assuming German law to apply, that will not give the plaintiff full freight in the circumstances of this case, for the provisions of the code only come in where the contract is silent; but here the only freight payable is on delivery at destination. Again, the German expert Hermann Hildebrand, who was examined in the case of *The August* (3), admitted that the primary rule was that the law of destination governed, and in this case the place of destination was Liverpool. Further, in *The August* (3) the basis of the judgment was that "a state of things not provided for, and not contemplated by the contract" had arisen, and the master thereupon, under the law of the flag, inferred from articles 504 and 640 of the German Commercial Code, exercised an option and sold the goods, and the German expert in his evidence dealt only with the facts of that case where there was an alternative whether the master would carry on the goods and earn his freight or sell; but in this case the master was obliged to sell. He had no opportunity of earning freight,

(1) 1 C. P. D. 423. (2) 42 Ch. D. 321.
(3) [1891] P. 328.

and was not acting as agent of the cargo-owner, and by his authority taking the goods on condition of paying full freight.

The three cases cited by Mr. Hildebrand (1) in support of his view of the law in the case of *The August* (2) do not go the length contended for, as they do not cover the case of goods so deteriorated that they must be sold. If the judgments are examined——

[LORD ESHER, M.R. We cannot go into those cases, as we cannot go behind the evidence of the German expert, nor does the order made by consent entitle you to read those judgments.]

The introduction into the contract of a supplemental stipulation compelling the cargo-owner to pay full freight on goods which the shipowner could not have carried on would in this case be very unjust.

[LORD ESHER, M.R. There is no necessary injustice in the matter, for, if the two laws differ, it resolves itself into the question, Who is to run the risk of the freight? If, by German law, the freight is payable by the cargo-owner under such circumstances as these, then he would insure. Under English law, as the shipowner cannot get the freight, he insures.]

The reason assigned for making the cargo-owner pay this freight is that the master acted as his agent in selling the goods.

[LORD ESHER, M.R. That is only a phrase to indicate that it is alleged, that the master has by German law a right to act in a given way, in a given set of circumstances. Very much the same idea is indicated when it is said in English law that the master may become the agent of the shipper by necessity.]

In *Vlierboom* v. *Chapman* (3) the claim by the shipowner for full freight was given up, but freight pro ratâ was insisted on, and though it is laid down that the master's authority to sell at an intermediate port is clear when the cargo is perishing, and the only alternative is a sale or a total loss of so much of the cargo as is in that condition, as regards freight Parke, B., says (4): "To justify a claim for pro ratâ freight there must be a voluntary acceptance of the goods at an intermediate port in such a mode

(1) See ante, p. 65.
(2) [1891] P. 328.
(3) 13 M. & W. 230.
(4) 13 M. & W. 230, at p. 238.

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as to raise a fair inference, that the further carrying of the goods was intentionally dispensed with . . . but it was said, that, where the goods were lawfully sold from necessity . . . necessity imposed upon the master the character of agent for the shipper," . . . but "the agency of the master from necessity arises from his total inability to carry the goods to the place of destination." In that case it was held that no freight was due; and in the present case no contract to pay freight can be implied, as there was no opportunity to shipper and shipowner to carry forward, for the shipper had no option—he was forced to let the goods be sold.

Joseph Walton, Q.C., for the respondent (plaintiff). The bill of lading incorporates the conditions of the charterparty, and no doubt that charterparty being an English document is to be read as understood in English; but the charterparty may be so read consistently with importing into it the provisions of German law, for this is not a question of the construction of the written contract, but the addition of something not contained in it; and as the charterparty only deals with the ordinary conditions of delivery, the real question is what law governs the rights of the parties in so far as those rights are not expressly defined by the charterparty. If the contract stated that, in no event should the shipowner be able to obtain full freight except on the net amount of cargo delivered, the present claim would fail; but the emergency which has arisen is unprovided for by the contract; and assuming, as is the fact here, that the ship is a bonâ fide foreign vessel and not really English, as in the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1), then questions outside the contract will be governed by the law of the flag, so that acts done by the master of the *Industrie* in a port of distress will be governed by German law: *The Gaetano and Maria* (2), and by German law the master in selling the goods acted as the agent of the cargo-owner, and at the same time contracted on his behalf to pay full freight.

No inference can be drawn from the fact that the exceptions in the charterparty are in the usual English form because they will be read, if necessary, so as to apply to the circumstances of

(1) 10 Q. B. D. 521. (2) 7 P. D. 137.

the case, as, for example, the exception "Queen's Enemies" was read as referring to the enemies of the sovereign of the country of the flag in *Russell* v. *Niemann*. (1).

The August (2) was a case between shipper and shipowner, and the action was for non-delivery of goods. Lord Hannen in his judgment there said (3): "Assuming that the contract in the present case was English, that does not govern the question of what law is to be applied to goods carried in a German ship, a state of facts not provided for, and not contemplated by the contract having arisen," and the learned judge then proceeds to decide the case according to German law.

[LORD ESHER, M.R. In that case it was held that the conduct of the master in dealing with the goods was justifiable by German law; but that has nothing to do with the payment of freight.]

The law of the flag will also govern the rights of the shipowner as regards freight due for the goods which were sold in the port of distress, that being a legal consequence of the implied contract between the parties, for the contract itself only provides what freight is due at the end of the voyage, that is, on cargo actually delivered at the port of destination. German law supplements the contract where it is silent, and, by incorporating the provisions of the German code as interpreted by the decisions cited by the German expert on the question of full freight in the case of *The August* (2), the Court will be acting in accordance with the probable intention of the parties, and adopting the consistent, intelligible, and convenient rule suggested by Willes, J., in *Lloyd* v. *Guibert* (4), that where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage, and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

LORD ESHER, M.R. This case turns entirely on the one question whether the defendants are liable to pay certain freight. The charterparty, which is the contract of carriage, is in writing,

(1) 17 C. B. (N.S.) 163.
(2) [1891] P. 328.
(3) [1891] P. 328, at p. 343.
(4) Law Rep. 1 Q. B. 115.

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and, therefore, it is for the Court to construe it; and the Court, under one set of circumstances, must construe it according to one set of canons of construction, and, in another set of circumstances, according to another set.

If a foreign contract is brought before an English Court, the Court has to construe that foreign contract, which is in writing, just as it is the Court which has to construe an English contract; but if it is a foreign contract which has to be construed, it must be construed according to the canons of construction used in the country to which the contract belongs, or, as we say, according to the place where it is made. Therefore, the first question is this: Is this contract, as a matter of construction, to be construed according to the canons of English construction, or according to the canons of German construction?

It is a contract made for the carriage of goods on board a German ship. Is that conclusive to shew that it is to be construed according to German canons of construction? It seems to me that that is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied.

The mere fact of its being written in English will not enable the Court to say that it is not a German contract. It might be made with the master abroad for the use of his ship from one foreign country to another foreign country, so as to have nothing to do with England at all.

If it were so, and the only fact to rely on was that the contract was written in the English language, I should think it would be construed according to the canons of the law of the country of the ship. It would be made under the flag, just as if it were made in the country to which the ship belongs. But where you find a great many other matters come in you have to consider them.

This is, no doubt, a contract in regard to carriage on board a German ship, but it is made between a German owner and the proposing English shipper, and it is made by means of a charter-party in writing, the instrument being headed with the English words "charter party." It is made in London, the contract is negotiated between two English houses, the English brokers authorized by the German owner and the defendants, the shippers,

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who are English merchants. It is made on an ordinary English form of charterparty.

Whether an ordinary German charterparty is at all in the form of an English charterparty I do not know. But this is on an ordinary form of English charterparty, and every stipulation in it is an ordinary stipulation in an English charterparty. The words or phrases used are peculiar to England. One has been particularly noticed—namely, "the Act of God." That is an English phrase, and has an English meaning. I care not whether there are words in a German charterparty agreeing with that; but it seems almost agreed that there are not.

In the same way there are the words "the Queen's Enemies." If this was a German charterparty, I do not doubt that "the Queen" would mean "the Emperor of Germany," in accordance with the decision in *Russell* v. *Niemann*. (1) But it is a thing to be taken notice of when you are trying to determine whether the document is an English or a German document; and then, when you find the terms used are applicable to England and not applicable to Germany, it goes a great way to shew that the document is to be construed as English. It is not, therefore, on any one of the facts I have stated that reliance is to be placed, but on all of them together.

What is the true inference? In order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together shew that the intention was to make an English contract, and that is all we want.

(1) 17 C. B. (N.S.) 163.

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It has been admitted, and I think, for the reasons I have given, rightly admitted, that this written contract must be judged by English canons. Then, if it is to be construed according to English canons of construction, we have to construe the phrase which deals with the payment of freight.

It is not as if the payment was not dealt with in the contract. It is dealt with, and we have to construe the meaning of the phrase in which it is dealt with, and that phrase is "freight to be paid on right delivery of cargo." That is an ordinary English phrase in common use in contracts of affreightment, whether they be bills of lading or charterparties.

Counsel for the plaintiff wishes to read it thus: "Payment to be made on right delivery of cargo, if discharged in the United Kingdom"; in other words, "if discharged nowhere else." I cannot read it so. I do not think that is the right construction. It is freight to be paid on right delivery of cargo, wherever the destination is. But as to the mode in which it is to be paid, if discharged in the United Kingdom it is to be paid in cash as customary, and if discharged elsewhere in cash at the exchange of the day. That is to say, the freight when due is to be paid in English money.

If it is paid in England it is to be paid, of course, in cash, and if it is to be paid abroad the payment is to be equal to cash in England, by reason of its being at the exchange of the day. Therefore you have now, if that be the true construction, to construe according to the canons of English construction the phrase "freight to be paid on right delivery of the cargo."

For long years that common phrase in ordinary English charterparties and bills of lading has been construed in but one way, viz., that it is an affirmative sentence that, by necessary implication, contains the negative. It means payment of freight on right delivery of cargo at the port of destination. That is the affirmative construction. The second is that it contains this negative by necessary implication, viz., that no freight is to be paid if there is no delivery of cargo. If it is there by necessary implication, it is common knowledge that it is the same as if it were written there in terms. Therefore you have the liability to pay freight, and the obligation to pay freight dealt with

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in a written contract, and you are to construe it in the way I state.

There is to be no freight payable unless the cargo is delivered at the port of destination, and that that has been the common reading of charterparties and bills of lading cannot be denied. The cargo may be lost by perils of the sea; part of it may be lost or the whole. It may be jettisoned rightly or unjustifiably; it may be sold justifiably or not, and it may be delivered in an intermediate port, whether a port of distress or not, if the shipper is there, and if the shipowner agrees to deliver it to him and he agrees to take it at the intermediate port. In all these cases when the ship arrives at the port of destination, there being, by reason of any one of these things, no cargo to deliver, or a short cargo to deliver, on the true construction of the written contract no freight is payable in respect of that part of the cargo, or the whole, which is not delivered.

With regard to the payment of freight, therefore, it is immaterial how it comes that the cargo is not there. The cargo is not there, and that is all. But if the cargo is dealt with by the shipowner or his captain before the ship arrives, it is lost to the consignee. If he brings an action for the loss of his cargo, he is met in the different cases I have described in different ways.

If he brings an action for the non-delivery of cargo, the captain says, "I jettisoned your cargo for the safety of all concerned. There is an exception in the bill of lading which says I am not to be liable for jettisoning cargo which is justifiably jettisoned. If I have jettisoned cargo without proper justification, my shipowner is liable to you for the loss of your cargo. If I jettisoned it justifiably he is not liable."

If the master has put into a port of distress, and rightly sold your cargo, you cannot sue him for the sale, loss, or non-delivery of it, because by the maritime law if he is in a port of distress and the cargo is in a particular condition and must be sold, he has a right to sell. It is immaterial whether he sells as agent of the cargo-owner or by reason of his right as captain. If it is a justifiable sale, the owner of the cargo cannot maintain an action against the shipowner for it.

If the sale is justifiable under the circumstances, the owner of

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the cargo must settle with his underwriter on cargo, but he cannot sue the shipowner. Whether the captain at the port of distress is or is not justified must be determined as in the case of *The Gaetano and Maria* (1), not by reason of any words in the contract of affreightment, but by reason of the right which he has outside that contract altogether in his right as captain to deal with damaged cargo in a port of distress. That case shews that his power and authority to sell must be determined by the law of his country, whether he has made an English contract or a contract under the flag. That does not interfere with the contract for payment of freight, which is wholly independent of that, and deals only with the state of things actually existing when the ship arrives at the port of destination; and the meaning of the words in the charterparty is that there and then, if you are ready and willing to deliver, you are entitled to your freight. If you are not ready and cannot deliver you are not entitled to it.

It seems to me that that is the true construction of the charterparty with regard to the payment of the freight, and therefore I cannot agree with the able and learned judge who has decided this case. I felt some hesitation for a long time because he had decided the matter, but I cannot agree with him.

I think that this contract is to be determined according to the canons of construction always in use; therefore that these defendants were not liable to pay freight in respect of the cargo not delivered; and that we must disagree, and say that judgment ought to have been entered for the defendants.

LOPES and KAY, L.JJ., concurred.

Appeal allowed.

Solicitors for appellants (defendants): *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for respondent (plaintiff): *Field, Roscoe, & Co.*

(1) 7 P. D. 137.

T. L. M.

[IN THE COURT OF APPEAL.]

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Admiralty—Ship — Marine Insurance — Collision Clause — Construction of Proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers."

The plaintiffs' steamship came into collision in the river Scheldt in Belgium with another British steamship, and in consequence the latter sank.

The Belgian authorities gave the owners of the sunken vessel notice to remove the obstruction, and, on failure to comply, the Belgian authorities removed it, and charged the owners of the sunken vessel with the cost, which they paid.

A moiety of this sum was paid by the plaintiffs to the owners of the sunken vessel, after a reference in the Admiralty registry, which followed an admission that both vessels were to blame by the owners of the respective vessels.

To recover a due proportion of this moiety, so paid to the owners of the sunken vessel, the plaintiffs sued the defendants, their underwriters on ship, under the following collision clause in the policy of insurance: "and it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured we" (the defendants) "will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured." . . . "*Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers . . . . consequent on such collision. . . .*"

Held, by the Court of Appeal (Lindley, A. L. Smith, and Davey, L.JJ.), reversing the decision of Gorell Barnes, J., that the defendants were not liable, as the proviso exempted them from indemnifying the plaintiffs for payments made directly or indirectly for removal of obstructions under statutory powers.

Appeal by the defendants, the Ocean Marine Insurance Company, Limited, against a decision of Gorell Barnes, J., in favour of the claim of the plaintiffs, the owners of the British steamship *North Britain*, for a loss under a policy of insurance on that ship.

The facts, so far as material, were briefly as follows:—

On February 10, 1891, the *North Britain* came into collision with the British steamship *Paraguay* in the river Scheldt, in the

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kingdom of Belgium, and in consequence thereof the latter vessel sank.

On February 21, the governor of the province of West Flanders, acting in the exercise of legal powers conferred upon him by a Royal decree, gave the master of the *Paraguay* notice to commence within six days the removal of the vessel as an impediment to navigation, otherwise such removal would be undertaken by the authorities at the expense of the interested party.

This notice not having been complied with, the authorities proceeded with the work, and, on September 26, the governor of West Flanders caused the agents at Antwerp of the owners of the *Paraguay* to be served with an order to pay to the cashier of the State, within fifteen days, the sum of 26,390 francs (1047*l.* 4*s.* 6*d.*), being the amount expended by the government in removing the wreck from the bed of the Scheldt.

This sum the owners of the *Paraguay* paid.

On March 13 the owners of the *North Britain* commenced an action in the High Court for damage by collision against the owners of the *Paraguay*, and on April 1 the owners of the *Paraguay* commenced an action in the High Court for damage by collision against the owners of the *North Britain*. On May 11 and October 29 respectively, an admission of liability was filed in the Admiralty registry by the defendants in each action.

The assessment of damages in both actions was referred to the registrar and merchants, and, by agreement and consent of the parties, the registrar allowed, as part of the claim of the owners of the *Paraguay*, the sum of 950*l.* 19*s.* 6*d.*, being the said sum of 1047*l.* 4*s.* 6*d.* paid to the Belgian State authorities, less 96*l.* 5*s.*, the proceeds of the wreck, whereby the owners of the *North Britain* became liable to pay, as part of the damages due to the owners of the *Paraguay*, one moiety of this sum, viz., 475*l.* 9*s.* 9*d.*

At the time of the collision the *North Britain* was insured with the defendants, by a policy for 900*l.*, upon hull valued at 11,000*l.*, and machinery valued at 4000*l.* In the margin was the following printed "collision" clause:—

"And it is further agreed, that if the ship hereby insured shall

come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we" (the defendants) "will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured."

"In cases in which the liability of the ship has been contested, with the consent, in writing, of two-thirds of the subscribers to this policy in amount, we" (the defendants) "will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

The following was in italics:—

"*Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.*"

It was admitted that the removal of the wreck of the *Paraguay*, as an obstruction to navigation, by the Belgian authorities was equivalent to the exercise of "statutory powers," and that the plaintiffs, as owners of the *North Britain*, were liable, as part of the damages due to the owners of the *Paraguay*, in the sum of 475*l.* 9*s.* 9*d.*; but the question for the opinion of the Court was, whether the defendants were liable under the policy to pay to the plaintiffs such proportion of three-fourths of this sum as the defendants' subscription bore to the value of the ship.

1893. May 16. The case was argued, under Order XXXIV.,

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r. 2, on a "joint admission of facts," to which was annexed the policy of insurance on the hull and machinery of the *North Britain*, dated February 12, 1890, and a translation of the Royal decree of December 6, 1858, under which the wreck of the *Paraguay* was removed by the Belgian authorities.

Robson, Q.C., and *Temperley*, for the plaintiffs, the owners of the *North Britain*.

Joseph Walton, Q.C., for the defendants.

The arguments of counsel fully appear in the following extract from the judgment of—

May 31. GORELL BARNES, J. . . . The point raised by the defendants was that the plaintiffs were claiming to recover for a sum which they had become liable to pay and had paid for removal of obstructions under statutory powers, but to which the defendants alleged that the collision clause did not extend. The argument for the plaintiffs was that the proviso was not intended to cut down the defendants' liability for the damages recoverable by the owners of the *Paraguay* against the owners of the *North Britain*, but was intended as a definition or explanation introduced to guard against the clause being construed to include claims not within its real scope, which they contended was, according to the case of *Taylor* v. *Dewar* (1), to provide for an indemnity for damages paid to those interested in the vessel collided with, her freight and cargo.

In the case referred to an attempt was made to extend a somewhat similar clause to damages recovered for personal injuries sustained by persons on board the ship with which the insured ship had come into collision. This attempt failed for the reasons given in Mellor, J.'s, judgment, though in the Scotch case of *Coey* v. *Smith* (2), referred to in his judgment, a similar attempt made under a slightly different clause was successful.

In the present case the first part of the clause is somewhat similar to the clauses in these two cases.

(1) 33 L. J. (Q.B.) 141; 5 B. & S. 58. (2) 22 Court Sess. Cas. (N.S.) 955.

The second part of the clause deals with the costs of cases disputed with the underwriters' consent, and with the liability of the underwriters being settled as if an adjustment had been made between the two colliding vessels on the principle of cross liabilities, instead of on the principle of a judgment for a balance only.

Then comes the proviso. The clause forms part of a policy upon ship, and is inserted in order to protect the owners of the insured ship for damage done by her in a collision which, according to the decision in *De Vaux* v. *Salvador* (1), is not recoverable from the underwriters on the insured ship under the ordinary terms of the policy which insures the owners against loss of or damage to the ship insured.

I think the clause in this case should be construed in the same manner as that in *Taylor* v. *Dewar* (2), and though it is slightly different from the clause in that case, the greater part of the reasoning in Mellor, J.'s, judgment applies. The second part of the clause is a further ground for adopting this construction.

These considerations seem to me to shew that the proviso is not to be construed strictly as an exception, but, as its terms shew, the object is to make it clear that the clause is not *to extend* to the claims mentioned in the proviso. It does not clearly express that the damages properly paid by the assured to the owners of a vessel with which the insured vessel has come into collision are in any way to be limited, and seems to me to be intended to exclude the possibility of claiming against the underwriters in respect of losses arising from claims which might be made directly against the assured by persons other than those interested in the other vessel, her cargo, and freight. Claims against the underwriters for expenses of removal, which the assured became liable to pay by the enforcement against them of statutory powers of removal of an obstruction caused by them, appear to be what the proviso deals with under that part which affects this question.

In my opinion, the plaintiffs are entitled to recover in this action.

(1) 4 A. & E. 420. (2) 33 L. J. (Q.B.) 141.

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On appeal,

Nov. 25. *Joseph Walton, Q.C.*, for the appellants (defendants), argued, as in the Court below, that the proviso was an exception for the purpose of cutting down the generality of the principal clause so as to exempt the defendants from liability in respect of the present claim, as well as certain other items of damage, consequent on the collision, which would otherwise fall upon them.

Robson, Q.C., and *Temperley*, for the respondents (plaintiffs), contended that the defendants were liable, under the principal clause, for sums paid by the plaintiffs "by way of damages" to the owners of the *Paraguay*, and as the proviso did not deal with payments by the plaintiffs "by way of damages," these words could not be read in so as to exempt the defendants from responsibility for the present claim, which was—not a payment for removal of obstructions under statutory powers, for which the plaintiffs had become directly liable—but for damages due to the owners of the *Paraguay*.

Nov. 27. LINDLEY, L.J. This is an appeal from the decision of Gorell Barnes, J., and the question raised by the appeal turns upon the construction of an addition made to an ordinary marine policy on ship.

The policy itself contains nothing which requires comment; but in the margin of it we have printed certain special clauses, and one relating to collisions which I will read. Before I read it I will state that there was a collision between the *North Britain*, the ship assured, and a ship called the *Paraguay*, in the Scheldt, and the *Paraguay* sunk; and, being an obstruction in the river, the Belgian authorities removed her, or ordered her to be removed, and that put the owners of the *Paraguay* to considerable expense. Both vessels were to blame. She sought to recover, and did recover, half the expense against the *North Britain*, and the *North Britain* seeks to be indemnified for that expense under the policy. The question is whether the clause I am about to read covers that item of damage. The clause runs thus: "And it is further agreed that if the ship hereby insured"

—that is, the *North Britain*—"shall come into collision with any other ship or vessel,"—which happened—"and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages, to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we will severally pay the assured such proportion," and so on.

Then there comes a clause for ascertaining the amount. Nothing turns upon that, because in this particular case the amount is not in dispute.

Then comes this: "Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

Now, upon that, two views are presented to the Court. One is that this proviso only applies to sums which the owners of the ship insured may become liable to pay directly for removal of obstructions caused by itself—the ship insured. The other is that which is contended for by the defendants in this particular case, that it covers whatever the plaintiffs may be called upon to pay, even to the other ship with which the collision has taken place, if that other ship has been ordered to pay for the removal of the obstruction.

The case is one of some little difficulty; but when we look at it, and at the object of the clause, it appears to me that the construction which is put by the underwriters is the correct one.

Now, what is the clause? The first part of the clause is by no means easy to construe. I am warranted in saying that, because it is construed one way in England and another way in Scotland. There is an ambiguity in the first part of the clause when you come to look at it. The ambiguity arises in respect of the expression "in consequence thereof."

The first clause is a damage clause; it is a clause under which the ship insured may have to pay damages. The words "in consequence thereof," namely, in consequence of the collision,

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are ambiguous, because it is doubtful what sort of consequences are included in that expression.

The proviso which I have read is a proviso to this clause. It begins, "Provided always that this clause." It is impossible to read that proviso as applying to that part of the clause which immediately precedes, and which relates only to the mode of ascertaining the liability. That would not make sense. The proviso is a proviso to the first part of the clause, and that is agreed upon all hands.

Now, when we come to read the first part of the clause, with the proviso, it appears to me that the object of the proviso is to remove the ambiguity to which the general language of the first part of the clause gives rise; and I cannot see how it is possible to construe or cut down this proviso so as to effectuate the intention of the parties, and so as to read it in the very narrow view which has been adopted by Gorell Barnes, J. He says the proviso is not, technically speaking, an exception. I do not think it is. He says it is put in by way of precaution. I think it is; but what we have to construe is the clause with the proviso, and I regard the proviso as a warning that you are not to read the clause so as to include the consequences mentioned in the proviso. The true meaning of the proviso is that "this clause shall in no case extend to any sum which the assured shall have to pay for removal of obstruction consequent on such collision." I know the clause itself says in terms "shall pay by way of damages"; but I do not think the construction which I am adopting involves the insertion of any words at all. It is, "in no case shall extend to any sum the assured shall become liable to pay"—that is, pay in respect of any ship by way of damages or otherwise.

The clause admits of two constructions; but one construction appears to me, with great deference to Gorell Barnes, J., not to give effect to the true meaning of this policy. I think, therefore, the appeal must be allowed.

A. L. SMITH, L.J. The question in this case is as to the true construction of a collision clause attached to a marine policy of insurance upon ship.

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To bring out the point clearly, I will take it that the *North Britain*, which was covered by the policy in question, by reason of the sole negligence of those on board, came into collision with, and sunk, the steamship *Paraguay* in the river Scheldt in Belgium, and that the owners of the *Paraguay* thereupon brought an action, in this country, against the owners of the steamship *North Britain* and recovered 1000*l.* damages, of which 500*l.* were for damages occasioned to the ship run down, and 500*l.* were for expenses the owners of that ship had become liable to pay and had paid for the raising of their ship, and which amount they were compelled to pay by reason of "statutory" powers conferred upon the authorities of the river Scheldt.

The question which arises is: Are both these amounts covered by the collision clause in the policy sued on, or only the first?

The first limb of the collision clause has been already read by Lindley, L.J., and I will not read it again.

Now, pausing at the words "not exceeding in respect of any one such collision the value of the ship hereby insured," I should have thought that, so far, this clause bound the underwriters to pay the plaintiffs three-fourths of the 1000*l.* which they became liable to pay, and had paid in this case, to the owners of the *Paraguay*.

The case of *Taylor* v. *Dewar* (1) has held, that under a clause very similar to the first limb of this clause the underwriters were not liable for those damages which the assured had had to pay for personal injuries occasioned to those on board the ship run down, and that the proper construction of it was that the underwriters had only to pay to the assured such damages as he had to pay in respect of the loss or damage done to the ship run down, or possibly to her freight or cargo, which for the purpose might be treated as part of herself.

The Queen's Bench differed from the Scotch case of *Coey* v. *Smith* (2), which held that the clause covered damages which the assured had to pay for personal damage done to those on board the ship run down as well as the other damage done to the ship itself.

(1) 33 L. J. (Q.B.) 141; 5 B. & S. 58. (2) 22 Court Sess. Cas. (N.S.) 955.

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This case, in my judgment, instead of assisting the plaintiffs (the assured), as far as it goes assists the defendants (the underwriters); for it might be argued from it that expenses incurred in raising a ship were not expenses incurred in respect of the loss or damage done to the ship run down; but I agree that this first limb of the clause, standing alone, does cover both sums of 500*l.* which the plaintiffs have had to pay to the owners of the *Paraguay*; and if this case had rested here I should have held for the plaintiffs. But this limb of the clause does not stand alone, for, after some intermediate provisions not material to the present point, it proceeds as follows: "*Provided always* that this clause" (that is, that this collision clause) "shall in no case extend to any sum which the assured may become liable to pay or shall pay for the removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures consequent on such collision, *or* in respect of the cargo or engagements of the insured vessel *or* for loss of life or personal injury."

Now, what is the meaning of this proviso? It is said by the plaintiffs that this is only a warning (whatever that may mean) to shipowners about to insure, that the underwriters will not be responsible under this collision clause for what insuring shipowners may have *themselves* to pay in respect of the enumerated matters, and that it does not cut down the general undertaking contained in the first limb of the clause to pay all damages (except perhaps for personal injuries) which the assured might be called upon to pay.

This appears to me to be a novel way of getting rid of one part, and an inconvenient part, of a contract which must be read as a whole.

By its very terms the second limb is stated to be a proviso upon the first.

It stipulates that this clause (that is, the collision clause—the whole clause) shall in no case extend to any sums which the assured may become liable to pay, or shall pay, for removal of obstructions and injury to harbours, &c., consequent upon a collision *or* in respect of the cargo or engagements of the insured vessel *or* for loss of life or personal injury.

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I ask this question: Have or have not the plaintiffs, when they paid the 500*l.* to the owners of the *Paraguay* for raising their vessel, paid the sum for removal of obstructions under statutory powers consequent upon the collision? The words are, "that the assured may become liable to pay or shall pay"—that is, however paid—they are not limited as contended for by the plaintiffs—"shall pay otherwise than in the shape of damages."

I can only give one answer to this question, and that is, that they have. With great respect, I cannot agree with Gorell Barnes, J., when he held that the proviso was not to be construed strictly as an exception to the first limb, but was only inserted to make it clear that the collision clause was "not to extend to the claims mentioned in the proviso."

Gorell Barnes, J., also held that this proviso did not extend to damages the plaintiffs might have to pay, but only to what liabilities they might incur themselves in respect of the matters enumerated therein; but I would point out that this proviso deals with three different classes of matters. The first includes payments made in respect of the removal of obstructions consequent upon collision.

I can find nothing in this part of the proviso to limit it to payments made in respect of removal of obstructions consequent upon collision or to limit it to payments made in respect of removal of obstruction otherwise than by way of damage.

The second class refers to losses sustained in respect of cargo and engagements of the insured vessel, which necessarily do not include payments by way of damages, for, as regards this, no damages could be recovered against the plaintiffs; and the third class refers to claims in respect to loss of life or personal injury, which appear to me to include not only loss of life and personal injuries upon the vessel in default, but also upon the vessel insured. There are no words limiting these classes to loss of life or personal injuries upon the defaulting vessel.

This last clause might well have been inserted, because of the existing conflict between the law of this country and the law of Scotland.

In my judgment, it is inaccurate to say that these three classes refer to payments otherwise than payments made by

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way of damages, for, in my judgment, the first class clearly does not.

Moreover, this remarkable result would follow if the plaintiffs' contention be correct.

If the ship of an assured is sunk consequent upon the negligence of those on board, and the assured has to pay for its removal, he cannot recover under this policy; whereas, if consequent upon the same negligence, the other colliding ship is sunk, and the assured has to pay by way of damages recovered by process of law for its removal, he can.

This cannot, in my view, be the true construction of this clause. If the parties really intended it to be otherwise, they must redraft the clause.

In my judgment, the proviso exempts the underwriter from the payment in dispute, and, therefore, I think that this appeal must be allowed.

DAVEY, L.J. I should feel greater diffidence in differing from the judgment of a judge of great experience in these matters were it not that my learned brethren think that the learned judge's construction is erroneous.

If I am to decide the construction of this clause exclusively upon technical grounds which appeal to a lawyer's mind, I observe in the first place that the owners of the *North Britain* are not, strictly speaking, seeking payment from the underwriters of any sum paid by them for the removal of obstruction as such, but what they are seeking is the reimbursement of damages paid or payable by the *North Britain* to the *Paraguay*.

On the other hand, I observe that the whole clause deals only with the question of damages; and the proviso is a proviso upon a clause which provides for the payment of damages, and it must, in my opinion, receive a meaning bearing some relation to the principal clause. No lawyer would say that the payment of expenses for the removal of an obstruction by the underwriters would be a payment of damages.

From this point of view, the considerations in favour of either construction seem to me to be very evenly balanced; but I am told that this is a clause in a business document, prepared by

men of business for their own use, and to be construed as men of business would understand it.

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Davey, L.J.

Endeavouring to the best of my ability to read the proviso in this mental attitude, I am of opinion that any layman of business would understand this clause to mean something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay to the injured vessel for damages; but, mind, I am not to be called upon to pay, directly or indirectly, for the removal of obstructions under statutory powers."

It would be, in my opinion, a strange result, and one that would startle most business people, if we were to hold that the underwriters of the *Paraguay*, for example, could not be called upon to pay the *Paraguay* for the expenses that the owners of that ship were put to for the removal of obstructions by the Antwerp authorities, but that they might be called upon as underwriters of the *North Britain* to pay indirectly exactly the same expenses through the medium of the liability of the *North Britain* to reimburse the *Paraguay*.

I think, with A. L. Smith, L.J., that the case which was referred to in the Queen's Bench is rather in favour of the appellants than against them, and I agree that the judgment appealed from should be reversed.

Appeal allowed, with costs here and below, and repayment of sum paid.

Solicitors for appellants (defendants): *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for respondents (plaintiffs): *Botterell & Roche.*

T. L. M.

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Sept. 13; *Dec.* 4.

IN THE GOODS OF GARNETT.

Probate—Testamentary Papers—Validity—Incorporation—Inadmissibility—Refusal of Probate.

The testator executed a document in the presence of two witnesses, who duly attested it. The document appointed no executors and contained no bequest, but referred to "the enclosed papers, numbered 1, 2, 3, 4, 5, and 6," as containing his testamentary wishes, and recited that those papers had been signed by himself in the presence of the witnesses, who, however, stated positively that they had never seen any of them. They deposed that the deceased called them into his study, told them he had made certain alterations in his will, and asked them to witness his signature; at the same time pointing to a rawer in the table at which he was sitting, saying, "The will is in this drawer." Papers 1 to 6 bore various dates antecedent to the attested document. All the papers were holograph, and the attestation clause of the attested document referred to the deceased as the "testator." All the parties interested having consented to the case being disposed of on motion:—

Held, that as the documents 1 to 6 were not clearly identified with the description given of them in the attested paper, so as to exclude the possibility of mistake, they could not be taken to be incorporated with such paper; and, as the attested paper, without the others, would be inoperative, probate of all the documents must be refused.

THIS was a motion for the decision of the Court as to whether certain documents should be admitted to probate.

Robert Garnett, late of Valley Field, King's Lynn, in the county of Norfolk, died on July 12, 1893, at Amingdon Hall, near Tamworth, in the county of Stafford, a widower, leaving sons and daughters of full age, and grandchildren, the children of a deceased son, also of full age.

After the death of the said Robert Garnett, a blue paper and six documents, numbered 1, 2, 3, 4, 5, and 6, respectively, were found by Herbert Garnett, one of the sons, in the deceased's strong-box. They were, when found, in an envelope, fastened down with adhesive-stamp paper, and marked by the deceased: "My last Will, 1890." Herbert Garnett handed the envelope, unopened, to his brother, Colonel Albert Peel Garnett, who opened it in the presence of several members of the family, when it was found that the seven documents were all separate the one from the other.

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The estate mainly consisted of shares in two companies, which were of very little value, and the deceased was, at the time of his death, largely indebted to a Mr. William Hayes. There was also money due from a company in Norfolk, which could not be paid till a grant of probate was obtained. It was for this latter purpose that the grant was really required.

The seven documents in question, which were all holograph, were as follow:—

No. 1.

"*Memorandum for my Executors.*

"Valley Field,

"King's Lynn, 5th January, 1883.

"In consideration of my having already given the following sums to the following members of my family viz.:—

"To Albert Peel Garnett . . .	£6000
„ Emily Bedford	1000
„ Robert John Garnett . . .	7000
„ Fredk. Willock Garnett . . .	5000

and nothing to my youngest son Henry Percy Garnett I hereby require and authorize you to retain in your hands and hold as trustees for the benefit of my said son Henry Percy Garnett, the sum of 1000*l.* (one thousand pounds) being a first charge upon my estate after payment of what may remain *due* by me *to* the trustees of Mrs. Frances Fisher and the discharge of all my legal debts and funeral expenses. Further that the annual sum to be paid to my son Edward Peel Garnett be 50*l.* (fifty pounds). This is very small and nobody can describe my feelings in thus reducing the annuity to so good a son. But poverty alone is the cause and however mistaken I may think his religious creed to be, I shall always regard him as truly good and estimable. He is well worthy of his hire, as a faithful labourer in the vineyard and will not suffer because my bequest is a mere pittance.

"Herbert must not think I have forgotten him because I do not name him specially. No father could have a better son. He is in a comfortable position and not dependent like Henry Percy.

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"I wish him to accept from me whatever there may be at Valley Field belonging to me in furniture linen wine or pictures. The *plate* I wish to go to the estate, but the clock in my smoking-room to go to Herbert.

"Robt. Garnett."

"18 Oct. 1884.

"I wish *all my plate* to be divided equally between my sons Albert Peel Garnett and Herbert Garnett.

"Robt. Garnett."

No. 2.

"Valley Field, Lynn,

"3 January, 1886.

"I hereby give for their sole use and profits to my sons Albert Peel Garnett and Herbert Garnett to be divided in equal parts the whole of the plate and plated property belonging and now at Valley Field with the full understanding that the whole of it is to remain at Valley Field during my lifetime.

"Robt. Garnett."

No. 3.

"*Memorandum.*

"17 November, 1887.

"I am in debt to Mr. Wm. Hayes of Ashton Hayes Chester, to the value of 6000*l.* (six thousand pounds). For this debt he holds as security my 100 shares of 100*l.* each in G. Skey & Co. and also a policy of insurance on the life of William Muir. On the decease of this Wm. Muir, Mr. Hayes or his executors will receive from the insurance company what may be due, probably quite 5000*l.* As I am joint owner of this policy with my brother Charles Garnett my debt to Mr. Hayes would be reduced to 3500*l.* In that case an arrangement might be made to pay off the whole remaining debt by sale of a portion of the 100 shares. This would depend upon the prosperity or otherwise of G. Skey & Co. Should such a sale be possible I wish my executors to effect it, if what they consider a fair price is offered. Any shares (of these 100 in G. Skey & Co.) which may remain after paying Mr. Hayes in full, I wish to be divided equally between my

daughter, Emily Bedford, and my son Henry Percy Garnett. In consideration of this act I revoke my bequest of 1000*l.* to Henry Percy Garnett contained in a Memorandum dated 5th January, 1883. 189 IN THE GOODS OF GARNETT.

"Valley Field." "Robt. Garnett.

No. 4.

"I hereby bequeath to my son Herbert Garnett my gold* Geneva watch. Also my violoncello by Forster, and all my music books.

"August 14, 1889. "Rob. Garnett.

"Valley Field."

"* The watch to go

"Albert Peel Garnett,

"8 January, 1890."

No. 5.

"*Further Memorandum.*

"8 January, 1890.

"It is my desire that in the event of my decease prior to the termination of the existing deed of partnership of Wm. Muir & Co. my executors should not be entitled to more than 10 (ten) p. cent. of the profits instead of 15 (fifteen) p. cent. and that the 5 p. cent. thus withdrawn be added to Herbert Garnett's share which will then be 20 p. c.

"Valley Field." "Robt. Garnett.

No. 6.

"I hereby bequeath to my son Edmund Peel Garnett 100*l.* (one hundred pounds). To my daughter Frances Fisher 100*l.* (one hundred pounds). To my daughter-in-law Annie Garnett 50*l.* (fifty pounds).

"All profits due to my estate from the business of Wm. Muir & Co. to be equally divided amongst my three children Albert Peel Garnett, Emily Bedford and Henry Percy Garnett. I appoint my sons Albert Peel Garnett and Herbert Garnett my residuary legatees.

"Robt. Garnett.

"Valley Field, 8 January, 1890."

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The blue paper was as follows:—

"The enclosed papers No. 1, 2, 3, 4, 5, 6, were signed by Robert Garnett the testator in the joint presence of us who thereupon signed our names in his and each other's presence.

"Robert Garnett,
"Valley Field,
"5th February, 1890.
"Frederick Daws,
"Gardener, Valley field,
"King's Lynn.
"Zebedee Rust,
"Coachman, Valley Field,
"King's Lynn."

The attesting witnesses, in their joint affidavit, deposed as follows: "The deceased called us into his room and said, 'I have made certain alterations in my will, and I want you both to witness my signature.' He further said: 'The will is in this drawer,' pointing to the drawer of the library table at which he was sitting. We are quite clear that no papers, except the one bearing our signatures, were shewn to us; nor did the deceased sign any paper, except the one, in our presence. No one else was present."

Colonel Albert Peel Garnett, the eldest son, who was also one of the residuary legatees of the deceased, applied for probate of the attested paper and of the documents 1 to 6 inclusive. All the members of the family, except one, filed consents to abide by the decision of the Court, upon motion. Mrs. Bedford, the remaining child, whom the deceased had special reasons for particularly benefiting, appeared by counsel and agreed to be bound by the decision of the Court, upon motion.

The matter first came before one of the registrars on September 13, when, as the registrar intimated an opinion adverse to the applicant, the motion was allowed to stand over generally, at the request of counsel, in order that the decision of the judge might be taken after the Long Vacation.

Searle, for the persons interested in the estate except Mrs. Bedford, now moved the Court to decree probate of the attested paper and of the documents numbered 1 to 6, therein mentioned,

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as together constituting the last will of the deceased. One difficulty is as to whether the last paper, which contains the signatures and attestation clause, is testamentary. The recital in the attested paper is probably a mistaken recital, because the witnesses are clear that they never saw the papers numbered 1 to 6. That these papers were in existence at the time when the attested document was executed is evidenced by the dates and the numbers upon them. All the dates are antecedent to the date of the attested document. The questions of fact which the Court has primarily to decide are, first, whether all the papers were in existence on February 5, 1890; and, secondly, whether they are sufficiently identified by the description contained in the attested paper?

[GORELL BARNES, J. Supposing those two facts found, does the statement by the testator that he has signed certain papers in the presence of two witnesses, who, themselves, witnessed this one piece of paper, make the other six documents, coupled with the attested paper, a will at all?]

Yes; with the addition of something in the attested paper, shewing that it is testamentary. The applicants rely on the word "testator," and submit that the only construction that can be put upon it is: "This is my will; I have had it attested; but my testamentary dispositions, to which I wish to give effect by my will, are contained in papers 1, 2, 3, 4, 5, and 6." Some other papers of a testamentary character were also found among the deceased's effects, and they rather assist the present application, as shewing that the testator drew a distinction between the documents dated before the execution of the attested paper and those dated afterwards. These latter are all written by the deceased in pencil, and contain requests to his executors; but he does not treat them as forming part of his will.

[GORELL BARNES, J. They are of the same class as the papers 1 to 6, and one or more of them are certainly of a testamentary character. Is there any case in which such an application as this has been granted?]

There is no case exactly in point. The Court is entitled to look at all the facts of the case, and to draw whatever inference can be drawn from them.

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[GORELL BARNES, J. The moment you begin to try and identify the documents, you are met by the difficulty that they do not agree with what is stated in the attested document.]

The attested document contains a statement which is clearly inaccurate; but the Court should not reject all the documents because of one inaccuracy. A perfectly accurate summary of the authorities applicable to this case is to be found in Williams on Executors, 9th ed. p. 86.

Everyone interested in the estate consents to accept the judgment of the Court upon motion, and to act upon these documents if the Court thinks fit to admit them to probate.

E. A. Jennings, for Mrs. Bedford, said that she would submit to any order that the Court should think fit to make on this motion.

1893. Dec. 4. GORELL BARNES, J. Mr. Searle has called my attention to the following passages from Williams on Executors, 9th ed. p. 86, as correctly stating the law applicable to this case: "But the reference must be distinct, so as, with the assistance of parol evidence when necessary and properly admissible, to exclude the possibility of mistake; and the paper referred to must be already written"; also, the note to that paragraph, which is, "Where a will refers to a paper, such paper cannot be incorporated with the will unless it be clearly identified with the description of it given in the will and be shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved, there can be no incorporation of the paper with the will," and, having regard to the wording of the attested document (blue paper read), I have come to the conclusion that the six papers, Nos. 1 to 6, are not shewn to be incorporated, so as to exclude the possibility of mistake, and are not shewn to be clearly identified with the description given of them in the blue paper. The latter describes them as having been signed by the testator in the joint presence of the attesting witnesses; but, according to the affidavit of those witnesses, no papers were signed by the testator in their presence, and, if I recollect rightly, no one of

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the papers was produced to them, except the blue paper which they did attest and which they saw him sign. All that the testator seems to have said to them was: "I have made certain alterations in my will and they are in this drawer; and I want you both to witness my signature." The will which he said was in the drawer is not shewn necessarily to have been the six papers which it is now sought to incorporate. It may, perhaps, be that they were in existence at that time, and, that they were then in the drawer which the testator indicated to the witnesses. But, in my opinion, in order that a document, which does not itself contain the terms of the will, should be allowed to incorporate other documents, the two matters mentioned in Williams on Executors, 9th ed. p. 86, should be established, and in this case that has not, in my opinion, been done. For this reason, coupled with what I have already said about the description in the executed document, the conclusion to which I have come is, that these documents ought not to be admitted to probate. The executed paper is inoperative, and none of the documents ought, in my judgment, to be admitted to probate.

Probate refused.

Solicitors for applicants: *G. Thatcher*, for Mrs. Bedford, one of the children of the deceased; *C. A. Jennings, for J. & C. Robinson & Wilkins.*

[Reported by H. DURLEY GRAZEBROOK, Esq.]

1894
Jan. 22.

In the Goods of JOHN CHAPPELL.

Probate—Appointment of Executor—Misdescription—Parol Evidence—Declarations of Testator.

Where a testator appointed, as one of his executors and trustees, "Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," and there was no Robert Taylor living at Warmley Hill in the parish of Bitton, but there was a James Alfred Taylor, bootmaker, living there, and it appeared that Robert Britton Taylor, his brother, also a bootmaker, lived at Hanham, in the same parish:—

Held, that extrinsic evidence might be received to shew that "James Alfred Taylor, of Warmley Hill," was a friend of the testator, and, that the testator had little acquaintance with "Robert Britton Taylor, of Hanham"; and, the Court having considered such evidence, ordered probate to issue to James Alfred Taylor, of Warmley Hill:

Semble, that evidence of declarations by the testator which tended to shew that he intended James Alfred Taylor, and not Robert Britton Taylor, to be his executor, was inadmissible.

This was a motion on behalf of James Alfred Taylor, of Warmley Hill, Bitton, Gloucester, bootmaker; James Lacey, of Oldland Common, in the same parish, hatter; and Samuel Quarman Gerrish, also of Oldland Common, accountant's clerk, that probate of the will, dated September 8, 1893, of John Chappell, late of Mount Hill, in Bitton, aforesaid, retired builder, should be granted to all or such one of them as were found to be entitled thereto; or, for such further or other order as to the Court might seem proper.

The testator by his said will devised all his real estate "to Robert Taylor, of Warmley Hill in the parish of Bitton, bootmaker," and to James Lacey and Samuel Gerrish aforesaid upon the trusts thereby declared; and he gave his house, with garden adjoining, in the occupation of one William Wotton, "to the said Robert Taylor, of Warmley Hill aforesaid, provided he accepts the executor and trusteeship of this my will"; and in case of his declining to do so, then the testator gave the said house and garden to Henry Arthur Williams, of Kingswood Hill, Bitton, absolutely, upon the like consideration and condition as aforesaid. The concluding direction in the will was as follows: "I appoint the said Robert Taylor if he accepts such appoint-

ment, and in default the said Henry Arthur Williams, James Lacey, and Samuel Gerrish to be executors and trustees of this my will."

The affidavits tendered in support of the application were those of James William Young, an accountant, of Kingswood Hill, and Ann Lacey, a sister-in-law of the testator. The former stated that he drew the will by direction of the testator, who, in giving the names of his intended executors, mentioned the name of a "Robert Taylor, of Warmley Hill, bootmaker"; and the deponent so wrote it in the will.

Ann Lacey, now dead, had deposed that she was a sister of the testator's deceased wife, and had lived in the same house with him for thirty-two years. In addition to certain references in regard to statements by the testator as to his intentions, which were held to be inadmissible, the deponent stated that she knew of her own knowledge that, at the date of the will and at the time of the testator's death, there was no person named Robert Taylor living at Warmley Hill, Bitton, but that James Alfred Taylor, a bootmaker, lived there; that the said James Alfred Taylor had been for many years a friend of the testator and herself and had formerly been a fellow apprentice with the testator's son. The affidavit also stated that James Alfred Taylor had a brother named Robert, also a bootmaker, who, at the date of the will and of the death, resided at Hanham, which was in the same parish as Warmley Hill.

Searle, in support of the application, submitted, upon the authority of *Charter* v. *Charter* (1), *In the Goods of Shuttleworth* (2), *In the Goods of de Rosaz* (3), and *In the Goods of Brake* (4), that evidence of surrounding circumstances was admissible for the purpose of shewing what person was intended by the testator as his executor and beneficiary. There is, in fact, no person surnamed Taylor and with the Christian name of Robert residing at Warmley Hill and carrying on business as a bootmaker. If the Court is satisfied that the person whom the testator intended to designate is more properly indicated by his

(1) Law Rep. 7 H. L. 364.
(2) 1 Curt. 911.
(3) 2 P. D. 66.
(4) 6 P. D. 217.

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description than by his name, it will not feel itself bound by the name put down on the document, but will accept the description therein contained.

Barnard, for Henry Arthur Williams, the substituted executor and devisee named in the will, who had received notice of this application, submitted that the affidavits as to surrounding circumstances were not admissible; and, particularly, the affidavit of Ann Lacey, she being since dead.

There is a Robert Taylor, who is a bootmaker and who lives in the parish of Bitton; though he does not live at Warmley Hill.

Searle, in reply. Evidence of surrounding circumstances stands on quite a different footing to declarations by the testator himself. These latter would be inadmissible.

THE PRESIDENT (SIR F. H. JEUNE). I think this case falls within the decision in *Charter* v. *Charter* (1) and *In the Goods of Brake* (2), because, although the will on the face of it appears clear, when one comes to inquire to whom the names and description are to be applied, it is found that there are two persons, one answering to the name and the other to the address. Upon that ambiguity, evidence as to the surrounding circumstances is admissible to shew which of the two it was that the testator meant, or rather, I should say, who it is that the testator really intended to indicate.

We ascertain from that evidence, excluding declarations of the testator, which, I agree, are probably not admissible, that one person was the intimate friend of the testator and was a fellow apprentice with his son, while the other person suggested was a comparative stranger. This makes it clear to my mind who was the person really intended. The only suggestion made contrary to that is that there is not in this will such kind of misdescription as lets in extraneous evidence. It is said that the name is correct if our view is limited to the name of the person and the name of his parish; but it seems to me that, in a case like this, inaccuracy or misdescription of address is quite as important as inaccuracy in the name. A testator, in

(1) Law Rep. 7 H. L. 364. (2) 6 P. D. 217.

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making his will, might not know the full Christian names of a person whom he is intimately acquainted with, or might not know his Christian name at all; but the one thing which, in all probability, he would know would be the address or the occupation of that person. I think that this case falls within the dictum of Lord Cairns in *Charter* v. *Charter* (1) and of the decision of Lord Hannen in *In the Goods of Brake* (2), and, upon the evidence of surrounding circumstances which has been adduced, I am clearly of opinion that the person whom the testator intended to designate in the will is James Alfred Taylor, and not Robert Taylor. I grant probate of the will to James Alfred Taylor.

Barnard, for H. A. Williams, asked for costs out of the estate.
Searle, for the applicants, did not oppose.

THE PRESIDENT made an order that Williams should have his costs out of the estate.

Solicitors for the applicants: *Thomas White & Sons, for Stanley, Wasbrough, & Doggett, Bristol.*
Solicitors for Williams: *Meredith, Roberts, & Mills.*

(1) Law Rep. 7 H. L. 364. (2) 6 P. D. 217.

[Reported by H. DURLEY GRAZEBROOK, Esq.]

1894
Jan. 29.

HANBURY *v.* HANBURY.

Divorce—Permanent Maintenance—Income of Respondent—Profits of Partnership Business — Undrawn Profits—The Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*The Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1—*Order for Security.*

In a petition for maintenance by a wife who had obtained a decree absolute for the dissolution of her marriage, it appeared that the husband's income was derived from a share in the profits of a firm of which he was one of the partners:—

Held, that he must be ordered to secure permanent maintenance for the wife, upon the basis of one-third of the whole of his share of the average profits to which he had been entitled during the three preceding years, although by the terms of the partnership, he was only entitled to draw a limited amount of the profits, unless with the consent of his partner.

THIS was a motion on behalf of the petitioner, Clara Martha Hanbury, to vary or add to the report of the registrar upon her petition for permanent maintenance.

The decree absolute was pronounced on December 20, 1892, for dissolution of the marriage on the ground of the adultery and cruelty of the respondent, Ernest Osgood Hanbury. The custody of the five children of the marriage, aged respectively 15, 13, 11, 10, and 7 years, was, by the decree, given to the petitioner. The petition for maintenance was filed on January 5, 1893.

The respondent was a brewer in partnership with a Mr. William Jude, at Wateringbury, Kent. The respondent's capital in the said business was reported to be 15,323*l.* 13*s.* 5*d.*, and his share of the profits for the years 1890, 1891, and 1892, was 3651*l.*, 3555*l.*, and 3551*l.*, respectively. By the articles of partnership, the respondent was not allowed, without the consent of his partner, to draw more than 200*l.* a month (2400*l.* a year) on account of profits. The balance of profit due to him in each year, after deducting his monthly drawings, is carried to his credit in the partnership books under a separate account called "Undrawn Profits Account." On or before October 7, 1890, the amount standing to the credit of the respondent in respect of his "undrawn profits" was 5515*l.*; but various sums had been drawn out

by the respondent between that date and February 8, 1892, with the consent of his partner, amounting altogether to 1600*l.*, and made up as follows: 200*l.* on November 7, 1890; 100*l.* on March 3, 1891; 200*l.* on March 23, 1891; 300*l.* on October 9, 1891; 300*l.* on November 23, 1891; and 300*l.* on February 8, 1892. The "undrawn profits" were thereby reduced to 4915*l.*, and, by the withdrawal of other sums, subsequently to February 8, 1892, the fund was further reduced to 3415*l.*, by the month of June, 1893. The respondent also raised, by way of mortgage upon his share in the business, the sum of 5000*l.*, made up as follows: 1000*l.* on May 23, 1892; 2500*l.* on November 15, 1892; and 1500*l.* on October 31, 1893. The respondent had, therefore, drawn upon the business within three years the sum of 6600*l.*, in addition to his ordinary drawings of 7200*l.* during those three years.

The respondent owned two policies of assurance upon his own life in the Clerical, Medical and General Assurance Society for 2000*l.* each, the premium on each of which is 50*l.* a year. By an indenture of settlement bearing date August 5, 1885, the respondent covenanted to pay a capital sum of 8000*l.* out of his business to the trustees of the settlement, and 500*l.* a year until the sum of 8000*l.* should be paid upon certain trusts therein mentioned, for the benefit of the petitioner and the children issue of the marriage. The said sum of 500*l.* a year had not been paid since the commencement of the divorce suit.

It was contended before the registrar, on behalf of the petitioner, that the undrawn profits of the business formed part of the income of the respondent, subject only, as to its being drawn upon, to the consent of the respondent's partner. The registrar reported on December 13, 1893, as follows:—

"It seemed to me that the undrawn profits were used as further capital in the business, and so contributed to the earning of the income.

"The income of the respondent would, therefore, amount to 200*l.* a month, i.e., 2400*l.* a year.

"It is submitted that 800*l.* a year should be secured as maintenance for the petitioner, and the sum of 250*l.* a year as maintenance for the children issue of the marriage."

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Articles 11 and 12 of the partnership deed were in these words:—

"Neither party shall enter into any bond or become surety or security with or for any persons . . . ."

"Neither party shall do or knowingly suffer anything whereby or by means whereof any property of the partnership may be seized, attached, or taken in execution."

The petitioner moved for an order to vary or add to the said report, upon the basis that the undrawn profits of the business formed part of the income of the respondent.

Deane, for the petitioner. The respondent's profits in the business amount, in the three years in question, to 10,757*l.*, or an average of 3585*l.* The petitioner is entitled to one-third of such amount, in addition to the allowance of 50*l.* a year for each of the children.

Barnard, for the respondent. This is an inconvenient form of application. The usual form is to give notice in what way it is desired that a report should be varied. Is this an order to secure an income or an order to pay it? The registrar always intended it to be an order for security: the petitioner now appears to wish that it should be an order to pay. The registrar was right in reporting that the respondent's income is only 2400*l.* a year. There is no property within the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, upon which maintenance can be secured by the respondent; and the case therefore falls under the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32).

[THE PRESIDENT. I held recently that where there was a going concern, that could be taken into account.]

Jardine v. *Jardine* (1), which was a decision of the full Court, is binding, and is authority for saying that maintenance cannot be secured upon property such as that of the respondent. The order in that case was made under the Act of 1866. That Act only applies in cases where there is no property upon which an allowance can be secured, and the decision in *Jardine* v. *Jardine* (1) amounts to this, that the Court cannot make the present order under s. 32 of the Act of 1857, and that capital in a busi-

(1) 6 P. D. 213.

ness is not property upon which maintenance can be secured. The order may be made under the preamble to the Act of 1866, and the words in s. 1 "in every such case." These words can only refer to what is mentioned in the preamble: *Medley* v. *Medley*. (1) Even if the Court should hold that it has a discretion, it should exercise that discretion by making the present order under the Act of 1866, which would give the respondent the right to come to the Court hereafter to ask that the amount should be reduced, if his income should fall off.

[THE PRESIDENT. Why cannot this be secured upon the profits?]

They would be no security if the partnership came to an end. The Court ought to protect a man whose property is locked up in a business. The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33, sub-s. 2, provides that a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under that Act for his separate debt. It would be unjust to make an order in this case under the first Act, as his profits from the business might fall off so as to preclude him from keeping up the payments; and, as soon as default were made, the petitioner or trustees might exercise the power of sale which is usually inserted in deeds of maintenance. The terms of the deed of partnership distinctly preclude the respondent from giving security or from doing anything whereby the property of the partnership might be seized. If the maintenance cannot be secured on the capital of the partnership, it cannot be secured upon the income. If income were "property," there was no necessity for the Act of 1866. Where is the line to be drawn? The report is also not quite fair as to the allowance for the children. The proper order would be that the petitioner should receive 50*l.* a year for each child until such child reaches the age of sixteen years.

THE PRESIDENT. The first point raised is as to the amount which ought to be allowed for the maintenance of the petitioner and the children of the marriage. The registrar has taken 2400*l.* as the annual income of the husband, and upon that basis

(1) 7 P. D. 122.

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has recommended 800*l.* a year as a proper allowance for the wife and 250*l.* a year for the five children. The question is, What can reasonably be taken as a correct estimate of the respondent's income in the future? To arrive at that estimate, it is usual to take as a basis of calculation the actual figures of the past three years. I see no reason to suppose that the respondent's income will be less in the future than it has been in the past; and although it may be that he will only be able to draw 2400*l.* from the business in each year, except with the consent of his partner, he will always be in a position to draw, with his partner's consent, the surplus profits which fall to his share; and if his partner withholds his consent, the surplus profits remain in the business and go to swell his income till such time as he may be allowed to draw them. The difference between 2400*l.* and the respondent's actual income during the three years in question is made up of sums which he may get as income at once, or which, if left in the business, bear interest. There is, therefore, no reason why I should not treat his future income as approximately the same as that of the past. I am not sure that some small allowance ought not to be made for capital which has been withdrawn, and I think 200*l.* would be a reasonable deduction to make from the annual income in that respect. This would reduce the average income to 3385*l.*, or, in round figures, 3300*l.* A third of that is 1100*l.*, and that is a proper amount, in my judgment, to be allotted to the petitioner. The 500*l.* a year payable under the existing deed must, of course, come off that, because the petitioner cannot have it twice over. The sum of 600*l.* a year will, therefore, have to be provided for the petitioner by the respondent, in addition to the 500*l.* a year already secured by the marriage settlement. Then comes the question: Is the order for that sum to be made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, or under the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32)? The petitioner desires the sum to be secured under the earlier Act, and I see no reason why it should not be so. All that *Jardine* v. *Jardine* (1) decides is that where one is dealing with property in a business, it is not necessary that the order should be made under the earlier

(1) 6 P. D. 213.

statute, but that the Court may avail itself of the later Act. Both, of course, could not be used, and the only doubt raised in the case of *Jardine* v. *Jardine* (1) was as to whether the Act of 1866 was available. I can understand that where the Court is dealing with a business of a very fluctuating kind, as was the case in *Jardine* v. *Jardine* (1), where the profits had been 18,000*l.* in one year and nothing in another, it would be both unwise and improper to order the respondent to secure maintenance upon it. In the present case, however, I am dealing with a well-defined income, of very even amount, arising year after year from the profits of the respondent's business, and I see no reason whatever why that should not be made the subject of security. The particular form of security will be considered by the conveyancer who draws the deed. I hardly follow the reference which was made by the respondent's counsel to the Partnership Act, 1890. It may be, if the respondent were to make default in payment of the maintenance, that the consequences might be serious ; but I should hope that that very fact would cause the respondent to be careful that there should be no default in the payments. The suggestion in regard to the children seems reasonable.

I make an order that the respondent do secure 600*l.* a year to the petitioner by way of permanent maintenance, in addition to the 500*l.* a year already secured ; and further, that the respondent do also secure for the five children the yearly sums of 70*l.*, 60*l.*, 50*l.*, 40*l.*, and 30*l.*, or 250*l.* a year, the lowest amount to drop out as each child successively attains the age of sixteen years.

Solicitors for the petitioner: *Routh, Stacey, & Castle,*
Solicitors for the respondent: *Hanbury, Hutton, & Whitting.*

(1) 6 P. D. 213.

[Reported by H. DURLEY GRAZEBROOK, Esq.]

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1893

Nov. 29; *Dec.* 1, 11.

[IN THE COURT OF APPEAL.]

THE MARY THOMAS.

Admiralty—Marine Insurance—Policy on Ship—Policy on Freight—Stranding—General Average payable per Foreign Statement—Costs of Discharging, Warehousing, and Reshipping Cargo—Suing and Labouring Clause—Bill of Lading—Negligence Clause—Dutch Law.

The plaintiffs effected with the defendants two policies of insurance, one on the hull and machinery of their vessel and the other on freight. Under both policies general average was payable as per foreign statement, if in accordance with the contract of affreightment. The policy on ship specially covered loss or damage through the negligence of the master, and both policies incorporated the ordinary suing and labouring clause.

The plaintiffs' vessel whilst carrying a cargo of grain from Nicolaieff to Rotterdam—under bills of lading which excepted strandings, even when occasioned by the negligence of the master—stranded on a reef off Malta. To get the vessel off, a portion of the cargo had to be discharged into lighters, taken to Valetta, and warehoused. The vessel was then towed to Valetta, and, to enable her to be placed in the pontoon dock, the remainder of the cargo was discharged and warehoused.

On the completion of the repairs the two portions of cargo were reshipped, and the vessel sailed for Rotterdam, where, after the cargo was delivered, an average statement was prepared shewing, according to the law and practice in Holland, the amount of general average sacrifices and expenses, and the proportions due from ship, cargo, and freight.

The defendants, as underwriters on ship and freight, paid their proportion; but, on suing the consignees of cargo in the Dutch Courts, the plaintiffs failed to recover from them their proportion, on the ground that—notwithstanding the negligence clause in the bill of lading—as the stranding was attributable to the negligent navigation of the master, there was no liability on the part of the cargo owners to contribute in general average.

The plaintiffs thereupon sued the defendants, upon the policy on ship, to recover the portion, debited per foreign statement to cargo, of expenses incurred in relation to the refloating of the vessel, the subsequent towage into, and the discharge at, Malta, and, under the suing and labouring clause in the policy on freight, for the portion, debited per foreign statement to cargo, of expenses incurred in warehousing and reshipping cargo:—

Held, by the Court of Appeal (Lindley, A. L. Smith, and Davey, L.JJ.), affirming the decision of Gorell Barnes, J., that the defendants were not liable, as the foreign adjustment was conclusive as to what were general average expenses, and as to the apportionment of those expenses, so that the plaintiffs could not, as against the defendants, select out of those expenses certain items and claim them on the ground that, according to English law, they would be charged as particular average on ship, or as being particular charges recoverable under the suing and labouring clause.

Appeal by plaintiffs, the owners of the steamship *Mary Thomas*, against a decision of Gorell Barnes, J., in favour of the

defendants, the Globe Marine Insurance Company, Limited, in respect of claims by the plaintiffs under policies of insurance effected with the defendants on ship and freight respectively.

The facts, so far as material, were as follows:—

On October 7, 1889, the plaintiffs insured with the defendants the *Mary Thomas*, for twelve calendar months commencing September 25, and ending September 24, 1890, under a policy of insurance (marked A) for 1000*l.* at 7*l.* 10*s.* per cent. (being one of a number under which the ship was insured), on a value of 28,000*l.* (made up of hull, materials, &c., 18,000*l.*, machinery, boilers, &c., 10,000*l.*). The risks, losses, and damages insured against were (inter alia) of the seas and all other marine perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of insurance or any part thereof at all times, in all places, and on all occasions and services whatsoever and wheresoever, including all risks incidental to steam navigation; and "in case of any loss or misfortune it shall be lawful to the insured their factors servants and assigns to sue labour and travel for in and about the defence safeguard and recovery of the aforesaid subject-matter of this insurance or any part thereof without prejudice to this insurance the charges whereof the said company (the defendants) will bear in proportion to the sum hereby insured." The following clauses were attached to the policy: "This insurance also specially to cover loss of, or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager." "General average and salvage charges payable according to foreign statement or per York-Antwerp rules if in accordance with the contract of affreightment."

On October 10 the plaintiffs effected with the defendants a second policy of insurance (marked B) for the same period as above, at 5*l.* 5*s.* per cent. on 1200*l.* freight chartered or otherwise in the *Mary Thomas*, and the risks, losses, and damages insured against were (inter alia) of the seas, and all other marine perils,

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losses and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of this insurance in port and at sea at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever. "General average payable as per foreign custom or per York-Antwerp rules if in accordance with the contract of affreightment." The policy incorporated a suing and labouring clause similar to that already set out in the first policy.

On May 5, 1890, the *Mary Thomas*, whilst on a voyage from Nicolaieff to Rotterdam laden with grain, stranded on the Monscian reef off the island of Malta. About 1100 tons of cargo were discharged into lighters, and (except a portion which was lost) taken to Valetta and there warehoused.

On the afternoon of May 6 the *Mary Thomas* was towed off the reef, and taken into Valetta Harbour, and was found not to be making any water; but the surveyors recommended that the vessel should be docked for further examination. The remainder of the cargo on board of about 1920 tons was thereupon discharged and warehoused, and, after survey, the vessel was placed for temporary repairs in the Pontoon Dock.

On May 23 the vessel was floated off the pontoon, and towed round to reload the two portions of cargo warehoused. This was completed by May 28, and it was admitted that the whole of the charges and expenses incurred by the plaintiffs at Malta, and paid by them in connection with the stranding, the repairs, and reloading, were reasonable and reasonably necessary.

On May 31 the vessel left Malta. On June 12 she arrived at Rotterdam, and delivered her cargo, which was carried under bills of lading containing the following exceptions: "The act of God perils of the sea fire barratry of the master and crew enemies pirates and robbers arrests and restraints of princes rulers and people and other accidents of navigation excepted, strandings damages caused thereby are also excepted even when occasioned by negligence default or error in judgment by the pilot master or other servants of the shipowners." The bills of lading also contained the clause, "General average payable according to the York-Antwerp rules."

After the delivery of the cargo an average statement (No. 1)

was prepared at Rotterdam, at the request of the plaintiffs, shewing 3972*l.* 7*s.* 6*d.* to be due in respect of general average sacrifices and expenses from the several contributory interests in the following proportions: ship, 1692*l.* 1*s.* 10*d.*; cargo, 2049*l.* 9*s.* 5*d.*; freight, 230*l.* 16*s.* 2*d.*

The underwriters on ship and freight (including the defendants) paid their proportions of the sum of 1692*l.* 1*s.* 10*d.* and 230*l.* 16*s.* 2*d.*, amounting, in respect of policy A, to 215*l.* 4*s.*, and, in respect of policy B, to 163*l.* 0*s.* 2*d.*; but, as the owners of the cargo refused to pay any part of the sum of 2049*l.* 9*s.* 5*d.*, the plaintiffs commenced an action against them in the Courts of Holland to recover this amount by way of general average contribution; judgment was, however, given against the plaintiffs, and affirmed on appeal, on the ground that, as the stranding of the *Mary Thomas* was attributable to negligent navigation on the part of her master, there was no liability on the part of the owners of the cargo laden on board to make any contribution in general average or otherwise.

On February 6, 1892, pending the above-mentioned appeal, a further adjustment (No. 2) was made in England, at the request of the plaintiffs, and the amount of 3972*l.* 7*s.* 6*d.* readjusted by the separation of all general average losses and expenses as per foreign statement under the several heads of (1.) repairs; (2.) salvage, &c., and shewing 806*l.* 9*s.* 3*d.* of the above sum to have been incurred for and in connection with the repairs, and of this latter sum 416*l.* 1*s.* 7*d.* to be the cargo's proportion. On the request of the plaintiffs, the defendants, on March 31, 1892, paid 14*l.* 7*s.* 2*d.*, being their proportion of this latter amount.

On May 26 a further average statement (No. 3) was prepared in England, shewing the details of the losses and expenses (other than repairs) allowed in general average, from which it appeared that the cargo's proportion of those losses and expenses amounted to 1633*l.* 7*s.* 10*d.*, including 84*l.* 3*s.* 4*d.*, the cargo's proportion of wages and provisions of the master and crew at Malta, and 175*l.* 10*s.*, the cargo's proportion of the cargo lost during the operations; but the defendants declined to pay any part of this sum.

The plaintiffs contended that, under policy A, the underwriters were liable for the whole of the expenses properly incurred by

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the plaintiffs in relation to the refloating of the *Mary Thomas*, the subsequent towage into Malta, and the discharging at Malta for the purpose of repairs, and the plaintiffs now sought to recover 42*l.* 3*s.* 1*d.* from the defendants, being their proportion of the following amounts, part of these expenses, which, not having been paid by the owners of the cargo, were now claimed by the plaintiffs from their underwriters, viz.:—

Portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in putting cargo over side into lighters, refloating the *Mary Thomas*, and towing her into Malta	£799	12	0
Portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in the discharge of cargo at Malta .	150	8	9
Portion originally debited (as per foreign statement) to cargo of agency and incidental expenses	227	3	3
	1177	4	0

The plaintiffs further alleged that various charges and expenses had been incurred by them subsequent to the discharge of the cargo at Malta, in connection with the warehousing and reshipping, all of which were included in the general average statement No. 1, and of which the plaintiffs had been unable to recover any portion from the owners of the cargo, and they now sought to recover from the defendants, under policy B, the sum of 139*l.* 4*s.* 4*d.*, being their proportions of the following amounts, which, not having been paid by the owners of the cargo, the plaintiffs claimed from their underwriters on freight, viz.:—

Balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in warehousing cargo . .	£69	15	4
Balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in reshipping cargo . .	126	15	2
	196	10	6

The questions for the opinion of the Court were:—

1. Whether, upon the non-payment of the cargo's proportion by the cargo owners, the defendants were liable to pay the sum of 42*l.* 3*s.* 1*d.*, or any, and what, part, under policy A.

2. Whether, upon the non-payment of the cargo's proportion by the cargo owners, the defendants were liable to pay the sum of 139*l.* 4*s.* 4*d.*, or any and what portion, under the suing and labouring clause of policy B or otherwise.

1893. July 25, 26. The case was argued on an agreed statement of facts, to which were annexed the two policies, the three average statements, and the bills of lading.

Joseph Walton, Q.C., and *H. Holman*, for the plaintiffs.

Carver, for the defendants.

The arguments of counsel fully appear from the judgment of Gorell Barnes, J.

[In addition to the cases cited in the judgment, Counsel for the plaintiffs referred to *Svendsen* v. *Wallace* (1), Counsel for the defendants to *Kidston* v. *Empire Marine Insurance Co.* (2)]

July 27. GORELL BARNES, J. (after dealing with the facts of the case, proceeded:—) The plaintiffs had to demand from the cargo its proportion of the general average which was attributed to it in the statement, and thereupon they made their claim in Holland against the consignees of the cargo, and were met by this answer: "We, the consignees, are not responsible to you for any contribution in general average, because, although the bills of lading under which the cargo was carried exempted the shipowners from responsibility, from, amongst other things, 'accidents of navigation, stranding, default or error in judgment of the pilot, master, or other servant of the shipowners,' yet that—while freeing the owners from responsibility for the loss brought about by the stranding—does not affect the ordinary rules applicable to the claim for general average, and that as the general average was really brought about by the negligence of the plaintiffs'

(1) 13 Q. B. D. 69; 10 App. Cas. 404.

(2) Law Rep. 1 C. P. 535; 2 C. P. 357.

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master or officer in charge, you, the plaintiffs, cannot claim from the consignees any contribution in general average."

That contest so raised came before the Courts in Holland, and ended in the decision that the cargo owners were not, under the circumstances, liable to make contribution in general average or otherwise to the shipowner.

There was an appeal on this matter, and the judgment was affirmed. Pending the appeal, on examination of the average statement, it appeared that part of the final item for general average included the cost of certain repairs to the ship, and that, I suppose, has been so included in accordance with the law and practice of Rotterdam; but as that item, so far as it related to the cost of repairs, would, according to the decision in *Dickenson* v. *Jardine* (1) in this country, be a matter for which the underwriters on the ship would be made primarily liable, with a right, if there is any, to enforce a claim for it against the cargo owners, the underwriters on ship appear to have assisted the plaintiffs in the appeal with the object of trying to enforce the liability upon the cargo owners so far as it affected that item, the plaintiffs themselves, of course, endeavouring to establish that responsibility so far as affecting the general contribution, and a small further statement was made up by average adjusters in this country with a view of seeing how this particular matter stood, and the gross amount of the general average—viz., 3972*l.* 7*s.* 6*d.*—was found divided in the statement to which I have referred in this manner: 806*l.* 9*s.* 3*d.* is treated as due to repairs, and 3165*l.* 18*s.* 3*d.* as due to the ordinary operation of salving the ship and cargo; and this item of 806*l.* 9*s.* 3*d.* is then apportioned between the steamer, the cargo and the freight, and the amount which the cargo would have to bear of it is 416*l.* 1*s.* 7*d.* There is a note on the statement as follows: "Cargo's proportion general average, repairs, not recoverable from that interest, 416*l.* 1*s.* 7*d.*, it is hereby agreed that the underwriters below" (that includes the defendants) "undertake to pay their proportion of the costs of the first Court and of the appeal pro ratâ of the division of the amount at issue as made by the adjustment"—that is to say, the underwriters being primarily liable for that item for repairs which,

(1) Law Rep. 3 C. P. 639.

so far as it related to the ship, had been discharged, but as far as it related to the cargo was not payable, agreed to bear any costs which would be attributable to it pro ratâ with the other costs in order to get it from the cargo owners. The proportion due from the defendants in that item is 14*l.* 7*s.* 2*d.*, and that was paid by the defendants to the plaintiffs; but when the appeal came on, the plaintiffs being defeated by the cargo owners, the underwriters did not get any portion back of the payment, they having, as I understand, borne their share of the costs applicable to it, but the position is such that they have discharged, in addition to the original contribution claimed from them by the first statement, this extra item which relates to the cost of repairs.

Having failed against the cargo owners to obtain any contribution from them, the plaintiffs originate what seems to me to be a remarkable idea. They turned round and said: "We have failed against our cargo owners to get any contribution from them, and now we will ask the underwriters on the ship to pay the whole expenses which are not recoverable from the cargo owners," apparently upon certain grounds which I will deal with in a moment; but the proposition struck me at the outset as a very remarkable one—that where there is an adjustment made out which apportions to the ship so much for saving it, to the cargo so much for saving it; that because you cannot get, from those who ought to be responsible under ordinary circumstances for it, contribution of the cargo—that, therefore, the underwriters on the ship are to pay the whole costs of saving ship and cargo.

That is the broad way in which this case really comes before me, and the broad point which, I cannot help thinking, notwithstanding the form of the case, was the real question intended to be put before me; but, with considerable ingenuity, the plaintiffs have, no doubt, seen the strange position which that would result in, and they have selected out of the average statement certain items, the details of which are not before me, and they have taken a portion of those items which I suppose by some calculation on their part they are able to shew have been debited against the cargo, and then they put forward those items, and say that those items, if you look at them by themselves, are items which, either partially or wholly, if looked at alone, would

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be moneys which were spent to save the ship alone. Those items are these: [The learned judge read the first item claimed, amounting to 799*l.* 12*s.*] This, they say, is wholly attributable to saving the ship. In terms it certainly is not. It is as much attributable to the cargo as to the ship. The next is: [The learned judge read the claim for 150*l.* 8*s.* 9*d.*] That they say is merely part of the cost of repairs, and, therefore, ought to be payable by the underwriters on the ship. It is not very clear in that particular case whether it really was part of the cost of repairs—and counsel for the defendants has pointed out several reasons why it should not be chargeable against ship alone—one relating to delay in connection with the pontoon, and others relating to the fact that it was treated as a whole operation. The third (the item of 227*l.* 3*s.* 3*d.*) would stand or fall, to some extent, with the others, because it is, I presume, a charge of percentage for agency based on the amount contributable.

The remaining two items relate to freight, the first of these (viz., the item 69*l.* 15*s.* 4*d.*) they say ought to be borne by the ship: I do not understand in the least why; and the last (viz., the item 126*l.* 15*s.* 2*d.*) they say is an item merely spent to earn the freight. The last item, I ought to have said, was debited to freight and not ship; and, no doubt, that item taken by itself is one which, speaking quite generally, without intending to lay down any rule about the matter, would ordinarily speaking be dealt with against charges which were incurred for the purpose of earning freight.

Now, these being the items picked out in this particular way, the points which are taken seem to come in this way. There is no question that the difficulty in the case has been created by the fact that the Courts of Holland have held that, although the bill of lading contains the clause to which I have referred making the shipowner not responsible for loss or damage caused by the stranding, where that stranding was brought about by negligence, the shipowner cannot claim from the cargo owners any contribution for general average.

That is the cause of this difficulty, and if that had arisen in this country—if that difficulty had been presented in this country—the point could hardly have occurred as it has done,

because it has been already decided by Lord Hannen in the case of *The Carron Park* (1) that the cargo owners would be liable for the contribution in general average under circumstances where the accident has occurred through negligence, but where by the bills of lading the owners of the ship were not responsible for that negligence. It seems to me quite obvious that when, by the terms of the contract of carriage, certain responsibilities are excepted—that is to say, in that particular case the negligence of the master or officers, which produced a stranding, that the owners, not being responsible for the consequence of this negligence—the position is this: that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say, "We must spend some money to get out of this difficulty, and that we must share in proportion to the benefit to be derived from it." And that seems the basis of the reasoning in this case, and therefore indirectly the contract of carriage does vary the position of the parties with regard to the general average, because it varies the risks which the general interests are exposed to.

But the plaintiffs' point taken in reply in this case was the following: They say that when the salvage operations are taken for ship and cargo the owners of the ship can recover from the underwriters on the ship in the first instance the whole cost of salving ship and cargo, leaving them to get a contribution by virtue of subrogation from the owners of the cargo.

That seems to me to be entirely wrong on principle. It is perfectly true that in one instance there is by virtue of the policy itself a case in which that can be done, namely, where part of the subject-matter of the insurance is sacrificed. As the underwriters have insured that particular thing, the assured of it can say: "Pay me for the loss of it, and then you can claim any benefit or right which I have against any other person to contribute

(1) 15 P. D. 203.

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to that loss." But it seems to me that this proposition, which is found in *Dickenson* v. *Jardine* (1), is wholly inapplicable to the case of expenditure, and I think it can almost be demonstrated to be wrong in such a case; because the operation of saving is taken for the benefit of both the ship and the cargo, leaving out the freight for a moment because it is in the same position as the ship; and therefore the captain who at this time, under ordinary circumstances, acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested, and all who are interested must contribute to it, and therefore the shipowner ought only to contribute so much, and then the underwriters, who have indemnified, have got to recoup him what he has paid, and if the terms of the suing and labouring clause which were referred to by the plaintiffs on this point are looked at, it will be seen that they bear out that view.

What the plaintiffs want to do, so far as this clause is concerned—and they tried to treat the general average in the same way—is to say that it shall be lawful to sue labour and travel for in and about the defence, safeguard, and recovery of the aforesaid subject-matter of this insurance or any part thereof, and all the other interests at stake, and then the company will bear their proportion of that. In support of that proposition counsel for the plaintiffs referred me to the case of *Dixon* v. *Whitworth* (2), which was the case in which Mr. Dixon had agreed with Mr. Erasmus Wilson for a sum of 10,000*l.* to transport the Cleopatra Obelisk to this country, and, having made that arrangement, he put the obelisk in an iron case, and took out a policy with the defendants in that case upon goods and merchandise in the good ship or vessel called the *Cleopatra*, the iron vessel containing the obelisk valued at 4000*l.*, against the risk of total loss only, and then that policy contained the ordinary sea risks and the suing and labouring clause in the ordinary form; and the case, on coming before Lindley, L.J., under the policy, after an Admiralty suit had been instituted against the obelisk by salvors who had picked up the obelisk in its case at sea and obtained 2000*l.* salvage, the owners then claimed on the underwriters for the repayment of that 2000*l.*; and Lindley, L.J., held that the

(1) Law Rep. 3 C. P. 639. (2) 4 C. P. D. 371.

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plaintiffs were entitled to recover from the defendants their proper proportion in accordance with their insurance of the sum of 2000*l*. That decision was reversed on appeal (1), owing to the decision in the case of *Lohre* v. *Aitchison* (2), which decided that salvage by independent salvors could not be recovered under the suing and labouring clause, and as the policy was against total loss only the plaintiffs could not recover for total loss, and could not recover under the suing and labouring clause. Now it is said, although that case was reversed, that the observations of Lindley, L.J., on the effect of the suing and labouring clause in his judgment (3), shew that, in the first instance, the whole of that 2000*l*. could be recovered from the underwriters on the *Cleopatra* and the obelisk, although somebody else was interested in the obelisk, and therefore it follows that the whole of the expenditure could be recovered in the first instance from the underwriters on the ship.

If Lindley, L.J.'s, judgment is taken as not affected by the reversal of the judgment by the Court of Appeal, it will be found that his language when looked at is no authority for that proposition at all, for this reason. After dealing with the language of the clauses, he says: "The agreement is, to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services; each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorizes the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing," and then he goes on to refer to one or two cases; but the language is wholly inapplicable to the interests of persons who are not interested in the thing, namely, the ship, but are interested in the cargo, a totally different thing from the subject-matter of insurance—another interest altogether; and in this particular case the underwriters had insured the obelisk itself and the entire vessel for the sum of 4000*l*.; and, therefore, by agreement between

(1) 49 L. J. (C.P.) 408; 43 L. T. (N.S.) 365.

(2) 4 App. Cas. 755.

(3) 4 C. P. D. at p. 378.

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themselves and the plaintiffs, they had valued the ship and obelisk at the 4000*l.*, and although there might be some interest on somebody's part in the obelisk itself behind the plaintiffs, yet the underwriters are liable to the plaintiffs for the costs of saving the iron ship and its cargo.

But that has nothing to do really with a case where a ship is at risk with somebody perhaps interested as well as the plaintiff who has insured it in full and another interest altogether, namely, the cargo, which belongs to somebody totally different, and is not insured or affected by the policy.

I should like to say that if the cases to which Lindley, L.J. refers (1) are examined, they certainly do not support the plaintiffs' proposition in this case. The case referred to by him, in which Chancellor Kent gave a decision, of *Watson* v. *Marine Insurance Co.* (2), and which seems in this judgment to have been taken as dealing with a case of different interests, and the owner's right to recover against his underwriters for all the expenses in that case, the evidence of the loss, as set out in the report, shews that the whole of the expenses which were in dispute were incurred about the business of the ship only; and the learned Chancellor in giving judgment says that the captain proved in that case that the expenditure, subject to the above exceptions, was necessarily incurred about the business of the ship and of her only, and he expressly declines to decide the question of what would be the case if they had been partially incurred for the ship and partially for the cargo, for he says: "All these subjects of insurance were equally involved in the peril, and it would seem to be just that the ship and freight should bear these expenses in due proportions throughout; and that the cargo should bear its proportion of the first part of the expenses, until the captain ceased to have any further concern with it. . . . The labour and expense were incurred for the recovery of the ship, notwithstanding that other subjects might incidentally enjoy the result of the effort," and then he refers to what the captain had said in his evidence.

There are one or two other cases referred to in that case and

(1) *Dixon* v. *Whitworth*, 4 C. P. D. 371, at p. 378.
(2) 7 Johnson's N. Y. Rep. 57.

in the report of another case in the same book, *Jumel* v. *Marine Insurance Co.* (1); one of these cases being that of *Maggrath* v. *Church* (2), in which the same principle which is laid down in *Dickenson* v. *Jardine* (3) will be found, but certainly it did not go further than that; and I think that the observations of Mr. Lowndes (4) and of Mr. Phillips (5) shew that the rule which I am endeavouring to apply, and the way I am applying it, is the true one.

Therefore I hold that the plaintiffs cannot, either by virtue of any principle, or by virtue of any authority, claim to recover from the underwriters of the ship the whole amount of the expenses incurred in saving the ship and the cargo, and can only recover the portion properly due to the ship.

Then the plaintiffs' next point is that, in this particular case, the money was, under the circumstances, only spent to save the ship, because the shipowner has not been able to recover from the cargo owner the contribution which he claims. The answer to that seems to me to be this, that as a matter of fact, at the time the expenditure was incurred, the captain was acting in the ordinary way, as much in the interest of the ship as in the interest of the cargo, and that the expenditure was in fact incurred in the ordinary way for the purpose of saving the ship, cargo, and freight.

Then the third point is with regard to these particular items, and that point is this: those items are really for saving the ship and freight, and should be so recoverable. Well, some of them may be, if the matter stood alone on a criticism of those items, though only some of them seem capable really of being brought into the category of expenses incurred only for the ship. But it seems to me that in this case you must take the matter as a whole. The parties made up an average statement, claimed upon their underwriters upon the footing of it, and the underwriters paid the whole of the amount expended for saving the

(1) 7 Johnson's N. Y. Rep. 412.

(2) 1 Caines Rep. 195; see also *Vanderheuvel* v. *United Insurance Co.*, 1 Johnson's N. Y. Rep. 405, at p. 413, judgment of Livingston, J.

(3) Law Rep. 3 C. P. 639.

(4) Lowndes on Average, 2nd edit. pp. 282, 283, and on Marine Insurance, §§ 331, 332; 2nd edit. §§ 200, 201.

(5) Phillips on Insurance, § 1742 n. (5).

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ship and freight upon the basis of an agreement of an average statement properly adjusted according to the law of the place where it ought to be adjusted, and it is impossible to pick out from that statement some items without taking the whole into account; and if you take the whole into account the owners of the ship have paid their various proportions of the matters which might perhaps, if you analysed the statement in England, be attributed to the cargo, and it seems to me you must take the whole of the adjustment, in which all the items have been dealt with according to the law of the place of destination, and, these having been settled and paid for, there is nothing whatever to shew that the plaintiffs have not received from the underwriters here all that is properly attributable to the saving of the ship and the saving of the freight.

Upon these grounds, therefore, I have come to the conclusion that the questions which are put forward for my decision must, under the circumstances of this case, where the matters have really been settled between the parties in the way I have already indicated, be answered in favour of the defendants.

On appeal,

1893. Nov. 29, Dec. 1. *Joseph Walton, Q.C.*, and *H. Holman*, for the appellants (plaintiffs).

Carver, for the respondents (defendants). The arguments of counsel were the same as already set out in the judgment of Gorell Barnes, J., in the Court below. [In addition to the cases there cited, the following were referred to: by Counsel for the plaintiffs, *Lee* v. *Southern Insurance Co.* (1). By Counsel for the defendants, *Kemp* v. *Halliday* (2); Lowndes on General Average, 3rd edit. p. 85.]

Cur. adv. vult.

Dec. 11. LINDLEY, L.J. The question in this case is whether the underwriters of policies on ship and freight respectively are liable to pay certain proportions of certain expenses incurred by the assured, the shipowners, and said by them to have been incurred in saving the ship and freight respectively. These

(1) Law Rep. 5 C. P. 397. (2) Law Rep. 1 Q. B. 520.

expenses have been treated as general average by a foreign adjuster, and have been apportioned by him between ship, freight, and cargo. The proportions allocated to ship and freight respectively have been paid by the underwriters; but the proportion allocated to cargo cannot be recovered by the shipowners from the cargo owners, and have been lost therefore, by them. They now seek to recover them from their own underwriters.

The question thus raised turns on the contract of insurance, and more particularly on that clause in it which is expressed thus: "General average and salvage charges payable according to foreign statement, or per York-Antwerp rules, if in accordance with the contract of affreightment." Nothing turns on salvage, nor on the York-Antwerp rules. For the purpose of this case the clause may be read short, thus: "General average payable according to foreign statement." The expenses referred to were incurred as stated in the agreed statement of facts, and it is obvious that most of the expenses, at all events, were incurred for the benefit, not only of the ship, but of the cargo also. None of them are on the footing of losses for which the underwriters were liable without any adjustment. The average adjustment was made at Rotterdam, and the adjuster, as already mentioned, treated these expenses as general average expenses. It is admitted that his adjustment is final and conclusive as an adjustment of general average: *Harris* v. *Scaramanga* (1) is conclusive on this point. But the shipowners contend that they are entitled to these expenses, either as partial losses or under the suing and labouring clause; and that the adjustment has nothing to do with, and in no way affects, claims in respect of partial losses, or claims under the suing and labouring clause.

It is, in my opinion, true that a general average adjuster ought to exclude claims for partial losses not incurred for the benefit of more parties than one, and claims under the suing and labouring clause for saving the ship alone. But he must decide what expenses, alleged to have been incurred for the benefit of both ship and cargo, are to be treated as general average expenses, and what are not, and expenses which are treated by him as general average expenses must be so treated, not only as between

(1) Law Rep. 7 C. P. 481.

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the respective owners of ship and cargo, but also as between them and their respective underwriters.

Expenses so treated cannot be treated as something else by those who have agreed to be bound by his decision. Some of these expenses, incurred according to the shipowners for the sole benefit of the ship, have been thrown on the freight and cargo by the average adjuster; others of these expenses, incurred solely for saving the freight, have been thrown on the ship and cargo; and now the assured contends that, as between himself and his underwriters, he is entitled to throw these expenses exclusively on the ship and freight respectively. This, in my opinion, is contrary to the contract, and cannot therefore be allowed. The assured is attempting by an ingenious process to convert his underwriters on ship and freight into guarantors for the payment by the cargo owners of those portions of the expenses which the average adjuster has allocated to them, but which they will not pay.

I am not at all prepared to say that the expenses in question were not general average expenses according to English law. Most, I think, were, but some may not have been. However, this may be, they were all general average expenses by the law of Holland, and were so treated by the foreign average adjuster. Under those circumstances, they cannot now be treated as something different. The principle contended for by the appellants is, in my opinion, unsound, and is opposed to, and not in accordance with, the contract entered into between the assured and the underwriters.

The appeal must be dismissed with costs.

A. L. SMITH, L.J. The plaintiffs in this case are attempting to get the benefit of Dutch law as to general average, and the benefit of English law as to particular average, regardless of the fact that by so doing their underwriters may have to pay for the same items of expenditure twice over.

Can this be done? The plaintiffs insured their ship and freight with the defendants upon the terms that, in case of a loss covered by the policy, general average should be adjusted according to Dutch law.

There is such a loss, and general average is thereupon so adjusted. By the Dutch law many items of expenditure are brought into general average which would have been charged to particular average against ship had the adjustment taken place in England.

The general average contribution of ship and freight is consequently increased, and the plaintiffs have received the increased contribution, and been paid by the defendants general average as per foreign statement.

The plaintiffs, nevertheless, now resort to English law, and assert that some of the items of expenditure (which have been rightly treated by the Dutch adjuster, according to Dutch law, as general average charges) are particular average charges according to English law, and seek to single these items out of the foreign statement, and sue the defendants for them as being particular average upon ship. This is a novel procedure.

There is no authority that this can be done, and if it can, the result would obviously be most unjust to the underwriters.

The case of *Dickenson* v. *Jardine* (1), relied upon by counsel for the plaintiffs, is no authority for what his clients are seeking to do.

What that case decided was that where goods are insured against jettison, and they are jettisoned, though under circumstances which give rise to general average, the goods owner can sue for a total loss without waiting for an adjustment and then suing for general average.

It in no way decides that where general average has been duly adjusted as per foreign statement, and the assured has been paid thereon, he can afterwards single out from that statement any items of expenditure he desires, and sue for them as being due from the underwriters to him.

I agree with the counsel for the defendants, that the clause "general average as per foreign statement" means that, in the case of a loss giving rise to general average, items of expenditure are to contribute to general average according to Dutch law, and that this excludes the view that such items are to be particular average according to English law.

(1) Law Rep. 3 C. P. 639.

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I apply these remarks also to the suing and labouring clause. The circumstances under which the defendants did pay some particular average to the plaintiffs I have not before me. Counsel for the defendants says they did so to make themselves secure; but, be this as it may, in my judgment it does not affect their position in the present case.

I agree with the forcible judgment of Gorell Barnes, J., who has dealt in detail with the facts of the case. I have nothing to add thereon, and I agree that the appeal should be dismissed.

DAVEY, L.J. The question is whether the defendants are liable to pay the sums mentioned in the statement of facts in respect of certain expenses either under the policy on the ship, or under that on the freight. The answer depends on the right construction of the policies. What is the effect of the clause "general average payable as per foreign custom"? The appellant admits that he is bound by it so far as the statement of the foreign average adjuster finds what can be recovered as general average against the ship, freight, and cargo respectively; but he contends that he is not bound by the finding of what are general average expenses in a claim against the underwriters of the ship and freight on his policies.

In my opinion, this is not the true construction or effect of the clause in question. Such a construction, counsel for the defendants says, would, on the one hand, throw upon the underwriter of the ship a proportion of charges which would, according to English law, be borne exclusively by the cargo, and, at the same time, leave the shipowner free to claim from the underwriter everything which, if the adjustment had been made in England, would be claimable from him. In other words, the plaintiff claims the benefit of both the Dutch law and the English law.

It is unnecessary to express any opinion whether that is the effect in the present case. It is sufficient for the argument of counsel for the defendants to say that it might be so. I am of opinion that it cannot be intended that the assured should be at liberty to approbate and reprobate, to take the benefit of the foreign law in claiming general average in accordance with it, and repudiate the foreign adjuster's award for the purpose of claiming

particular average against his insurer upon an adjustment made by an English average stater.

I am of opinion that, according to the true construction of the policy, the assured is bound by the foreign adjuster's decision as to what expenses were incurred on behalf of ship and cargo, and would therefore be the subject of general average for all purposes. I was rather startled by the broad proposition put forward by counsel for the plaintiffs, that the same matters might be the subject of general average and of particular average. If you look into the case cited by him (*Dickenson* v. *Jardine* (1)), I think he laid down the proposition too widely. In that case jettison was one of the risks insured against in a policy on goods. The underwriter, therefore, had contracted to indemnify the assured against that particular risk, and it was held that the assured could recover according to the tenor of the policy, the insurer being subrogated to the assured's rights (if any) to contribution from ship and freight. That I understand.

In the present case the assured can only recover under the suing and labouring clause the expenses incurred on behalf of the ship, and, ex hypothesi, the adjuster by bringing them into general average finds that they were incurred on behalf of ship, freight, and cargo.

I am of opinion that the plaintiff has agreed to be bound by that finding, and I agree with the decision of the learned judge in the Court below, and with the reasons given for it.

Appeal dismissed.

Solicitors for the appellants (plaintiffs): *Downing, Holman, & Co.*

Solicitors for the respondents (defendants): *Walton, Johnson, Bubb, & Whatton.*

(1) Law Rep. 3 C. P. 639.

T. L. M.

1894
Feb. 6.

THE PRIMULA.

Admiralty—Ship—Charterparty—Disbursements at Port of Loading—Advance on Account of Freight.

The plaintiffs' steamer was, on two occasions, chartered by the defendants for the homeward voyage from a Spanish port to Liverpool. The charterparties provided for the payment of certain lump sum freights, and both contained the following clause: "Cash for steamer's ordinary disbursements at port or ports of loading; not exceeding 150*l.* in all, to be advanced at exchange of 50*d.* to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight, on right and true delivery of the cargo, in cash."

On the first voyage the master, having part of his outward freight in hand, partly disbursed the vessel therewith, and the defendants advanced cash for the balance, amounting at the stipulated rate of exchange to 90*l.* 16*s.* 6*d.*

On the second voyage the master, having a sufficient balance of his outward freight, fully disbursed the vessel to an amount exceeding 150*l.*, and did not obtain any advance freight from the defendants.

The defendants deducted from the freight, due to the plaintiffs on the delivery of the homeward cargo on the first voyage, the profit they would have made by the difference of exchange on the amount required to make up 150*l.*, and, on the second voyage, the profit which they would have made by the difference of exchange on the whole 150*l.*, if they had advanced that sum on account of freight at the loading port.

In an action by the plaintiffs against the defendants for balance of freight so deducted:—

Held, by Gorell Barnes, J., that the plaintiffs were entitled to succeed as the clause was optional, not obligatory, on the plaintiffs, so that if they provided their master with money to disburse the ship, he was not bound to apply to the defendants for cash up to the limited amount by way of advance freight.

MOTION for judgment by the plaintiffs John Blumer & Co., the owners of the steamship *Primula*, against the defendants, J. A. Finzi & Co., agents of charterers for 48*l.* 18*s.* 5*d.*, balance of freight.

By consent the case was tried without pleadings, on the following admitted facts:—

The plaintiffs' steamer was on two several occasions chartered for a voyage from certain ports between Tarragona and Gibraltar to Liverpool. The charters provided (inter alia) for payment of certain lump sum freights for the chartered voyages, and clause 6 in each charterparty ran as follows: "Cash for steamer's

ordinary disbursements at port or ports of loading; not exceeding 150*l.* in all, to be advanced at exchange of 50*d.* to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight, on right and true delivery of the cargo, in cash."

On the first voyage, the master of the *Primula*, having part of his outward freight in hand, expended it in partly disbursing his vessel, and the defendants advanced cash for the balance, amounting at the stipulated rate of exchange to 90*l.* 16*s.* 6*d.*, and this sum was indorsed on the bills of lading. The defendants charged the stipulated 3 per cent. on that amount, viz., 2*l.* 14*s.* 5*d.*, and deducted these two sums from the balance of freight due to the plaintiffs on the delivery of the cargo on that voyage, and also the sum of 14*l.* 10*s.* 11*d.*, representing the profit which the defendants would have made by the difference of exchange on 59*l.* 3*s.* 6*d.*, the sum required to make up the advance of 150*l.*

On the second voyage, the master of the *Primula* had a sufficient balance of his outward freight to fully disburse the vessel at her loading ports, and therefore did not ask for, or obtain, any advance of freight under the clause in the charter. The defendants deducted from the plaintiffs' freight on the delivery of the cargo the sum of 34*l.* 7*s.* 6*d.*, being the profit which they would have made by the difference in exchange on 150*l.* if they had advanced that sum on account of freight at the loading port.

Neither the plaintiffs, nor the master of the *Primula*, obtained any loan or advance from any persons other than the defendants on account of the ship's disbursements upon either of the voyages. The defendants were ready and willing to have advanced the full sum of 150*l.* on each of the voyages if the master had requested them to do so, and the ship's ordinary disbursements on each of the voyages exceeded that amount.

It was agreed between the parties that, if the defendants were entitled to the deductions, judgment was to be entered for them without formally pleading a set-off or counter-claim; otherwise judgment was to be entered for the plaintiffs for 14*l.* 10*s.* 11*d.*, and 34*l.* 7*s.* 6*d.*, amounting together to 48*l.* 18*s.* 5*d.*

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J. Strachan, for the plaintiffs. There was no obligation on the master to obtain the whole, or any portion, of the sum of 150*l.* by way of advance freight from the defendants at all events, but the clause was inserted for the benefit of the shipowner to enable the master to get funds at the port of loading. In *Dahl* v. *Nelson* (1) Lord Watson says (2), with reference to clauses in contracts of affreightment, that stipulations of this kind are to be construed "as fair and reasonable men would presumably have agreed," and it is not to be supposed that the master was bound to borrow money at the par value of the Spanish dollar and make his owners liable to pay 25 to 30 per cent. over the present exchange.

The words "if required," or some such words indicating an option on the part of the borrower, must be read into the clause, just as in *Cross* v. *Pagliano* (3) it was held that the defendant was not bound to employ the plaintiff's agents to procure and ship a homeward cargo unless he determined to take one. The master must come and ask for the money on account of disbursements, and then, if the money is actually advanced by the charterer, it will become advance freight, but not otherwise.

H. F. Boyd, for the defendants. This is a printed clause in a Spanish fruit charterparty, and contains no words of option. It is obligatory on both parties, and as the disbursements at the loading port on each occasion actually exceeded 150*l.*, the master was bound to have applied to the charterer for the advance to cover the disbursements, and the charterer was bound to make it. A stipulation of this nature by which the charterer makes a profit is taken into account by him in calculating the amount of freight he is willing to pay. The advance is not a loan, but on account of freight, with the result that, if the ship never reaches her destination so that the 150*l.* is never earned as freight, still the defendants are liable for that amount to the plaintiffs if it has been advanced for disbursements, and the defendants would have an insurable interest: *De Silvale* v. *Kendall.* (4)

(1) 6 App. Cas. 38.
(2) 6 App. Cas. at p. 59.
(3) Law Rep. 6 Ex. 9.
(4) 4 M. & S. 37.

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[The following cases were referred to: *Smith* v. *Pyman* (1); *Byrne* v. *Schiller*. (2)]

J. Strachan, in reply. The charterer had no insurable interest in the uncertain amount which, not having been applied for, was never advanced, and which, therefore, never became advance freight.

GORELL BARNES, J. The question, as argued before me, has really been whether or not the defendants are entitled to recover the amount by way of counter-claim for damages for breach of contract, and, therefore, by agreement between the parties to deduct it from the freight. That depends upon the meaning of this clause. On the plaintiff's side it is contended that that clause is introduced for the benefit of the shipowner, in order to provide his master with the means of liquidating the disbursements at ports of loading up to the limit of 150*l.*; that the master is at liberty to use that credit, if I may term it so; and that if he uses it, the moneys advanced under it are to be treated as part of the freight; and if he does not choose to use it, and does not require to use it because he has money in hand, he is not obliged to use it.

On the other hand, the defendants say that the clause makes it obligatory on the master, after he has paid the various disbursements of the ship at the port or ports of loading which are necessary for her voyage, to come to the charterers and ask for the amount, and that if he fails to do so the shipowner is liable for the breach of contract, and for the damages which flow from that breach, and for the loss of profit which the charterers could make if they had made the advance. So the question really comes to this, whether the master is obliged to put the clause in force and ask for the money, or whether he is only to use it if he finds it necessary to do so.

It is said by counsel for the defendants that the charterers would be liable for the amount of disbursements in this sense, that if the disbursements are made, the master would have to come and ask for them, and they would then be bound to advance them under the clause, and they would then have an insurable

(1) [1891] 1 Q. B. 42, 742. (2) Law Rep. 6 Ex. 20, 319.

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interest in the amount they had advanced; and even if he had failed to do so, still they would be liable to make the advance, and have the advance at risk.

Gorell Barnes, J.

I cannot follow that argument, because it seems to me that until the master states what the amount of the disbursement is, and asks the charterers to make the advance, they would not be under the obligation to pay him the amount of the disbursement and advance it to him, and that their liability to make the advance would only arise when he states how much he wants. But I do not think that quite disposes of the arguments for the defendants. Even if that were so, and the freight were not at their risk till they had advanced it, or were liable to advance it, still they may, from the defendants' view of the clause, be entitled to say, "You are bound to come and ask for an advance, and, therefore, we have lost the profit we should have made if you had done so."

That drives me to consider really what was the object of the introduction of this clause, and what is a reasonable meaning to give to it as a matter of business between these parties. Now, I have no doubt whatever that the object of this clause was to enable the shipowner to send his ship to the port or ports of loading with a provision that, when she got there, the charterers should be bound to pay the master if he wanted it, as part of the freight, sufficient money to disburse the ship so as to enable her to perform her voyage—that is to say, to anticipate part payment of the freight, the shipowner being desirous of having the credit, so to speak, at the loading port, which his master could use if he wanted to.

Looking to the object of the clause, the question is, whether the captain is bound to use the clause and bound to ask for the money from the defendants; and the conclusion to which I have come, as a matter of the fair meaning of the clause, especially having regard to its origin, is that the captain is at liberty to take advantage of the clause or not, as he, in fact, finds it necessary. If, therefore, he has money provided for him by the owners with which to pay the disbursements of the ship, it is unnecessary for him to go to the charterers and ask for any money as an advance; and I cannot think it was ever intended

that the owners of a ship should be responsible in damages if their master was put in a position by themselves to advance the money for disbursements, or chose to advance it out of his own money, and that they should be held liable for a breach of contract for not going to the charterers, through their master, and asking for an amount for paying bills in port.

It involves, possibly, the introduction of some words to make that plain, though I am not quite clear that it really does so, because it has been urged that the ordinary disbursements referred to, mean the ordinary disbursements which the master finds it necessary to make, and for which he has to get credit or funds.

However that may be, I think the fair meaning of the clause is that the shipowners are to be in a position to ask through their master for sufficient cash up to the limited amount to pay the disbursements at the port, if they require it, but not otherwise; and that being so, the amount which the plaintiffs seek to recover is due for freight, and the defendants are not entitled to make a cross-claim for the amount, and are not entitled to deduct it from the freight.

Judgment must therefore be for the plaintiffs for 48*l.* 18*s.* 5*d.*, which is the agreed amount, with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Lowless & Co.*

T. L. M.

C. A.
1893
Dec. 13.

[IN THE COURT OF APPEAL.]

ALLEN *v.* ALLEN.

Divorce—Practice—Wife's Costs pendente lite—Provision by Husband for Wife's Costs—Separate Estate—Rules of December 26, 1865, *r.* 158. (1)

On an application by a wife pendente lite in divorce proceedings, that her husband may be ordered to pay her costs already incurred, and give security for her future costs, the judge has a discretion to be exercised with regard to the whole circumstances of the case, and may take into account the relative incomes of the husband and wife, and is not bound to refuse the application because the wife has separate property the amount of which is much more than sufficient for payment of her costs.

THESE were cross-petitions by husband and wife.

On March 17, 1893, the wife filed a petition for judicial separation on the ground of cruelty. On the following day the husband filed a petition for divorce on the ground of adultery. On May 29 the two suits were consolidated.

On March 19 the wife presented a petition for alimony pendente lite. It appeared that the husband had an annual income of about 4000*l.*, and that the wife had separate property producing an income of about 280*l.* On June 23 an order was

(1) Rule 158: After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of the cause, by order of the judge ordinary or of the registrar, to be obtained on summons, a wife who is petitioner or has entered an appearance as respondent in a cause may file her bill or bills of costs for taxation as against her husband; and the registrar, to whom such bills of costs are referred for taxation, shall, when directions as to the mode of hearing or trial shall have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing or trial of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar: Provided that in case the husband should, by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

made giving the wife alimony pendente lite at the rate of 500*l.* a year, payable monthly, in addition to her separate income.

On August 10 the wife took out a summons for her husband to shew cause why he should not be ordered to pay her taxed costs of suit up to the time of setting down the cause, and why he should not be directed to pay into Court or give security for a sufficient sum of money to cover her future costs of and incident to the hearing.

On August 12 the summons came before the judge, who directed the parties to go before the registrar.

The registrar, on November 17, reported as follows:—

"It having been referred to me to report as to the means respectively of the husband and wife in this suit, and whether, having regard to their respective incomes, the husband should be ordered to pay the wife's costs already incurred, and to secure to the wife the costs of the hearing or otherwise, I beg to report as follows: Since the allotment of alimony the solicitors for both parties have been before me, and I have carefully reconsidered their respective incomes. The husband's means are derived from various investments." After some observations about fluctuations in their value, he stated: "I think, therefore, that the husband's income may be considered to amount to about 4000*l.* a year. The wife has an income of 280*l.* derived from various investments, and a further sum of 500*l.* a year has been awarded her during the suit for alimony. The husband's income would therefore, after deducting 500*l.* a year for alimony, amount to about 3500*l.*, and the wife's, with the alimony, to 780*l.*—i.e., 280*l.* would be her income absolutely, and a further allowance of 500*l.* a year, but only during the suit. The suit is an expensive one, as there have already been two commissions, at the husband's instance, to France. The wife's costs already incurred amount (subject to taxation) to 318*l.*, and 90*l.* have been already paid to her in respect of these costs, and probably about another 50*l.* will be incurred before the trial. It is submitted that the husband should be ordered to pay the costs already incurred, and pay or secure the costs of the hearing."

On November 20 the case came before Gorell Barnes, J., who

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made an order according to the terms of the summons. The husband appealed.

It was admitted during the argument that the wife's investments, producing 280*l.* a year, were her absolute property.

Lockwood, Q.C., and *Searle*, for the appellant. The object of the rule, which requires the husband to make provision for the wife's costs, is that she may not be debarred from obtaining legal assistance. It is a rule of public policy, and if the wife has separate estate of her own sufficient to enable her to employ a solicitor the reason for the rule ceases. The registrar exceeded his authority in considering the relative incomes of the husband and wife; the only question for him was whether the wife had sufficient separate estate to meet her costs. Here the wife has absolute separate property worth about 6000*l.* Before the Married Women's Property Act, 1882, this question could seldom arise, as a married woman scarcely ever had any separate estate, except the income of property settled to her separate use without power of anticipation; but the case now is quite different, and there is no ground for applying in such circumstances a rule which was founded on the view that a married woman had no property at all with which she could deal. The proviso in rule 158 of the Rules and Regulations (Dec. 26, 1865), assumes that a sufficient separate estate will be a ground for refusing costs pending suit. In the present state of the law a married woman is much in the same position as a feme sole with respect to property, and the Court may, and often does, order a wife with an abundant separate estate to pay to her husband his costs of matrimonial proceedings in which she has been unsuccessful.

[LINDLEY, L.J., referred to *Russell* v. *Russell*. (1)]

Lawson Walton, Q.C., and *R. H. Pritchard*, for the wife. The foundation of the rule as to a wife's costs is the importance to society that she should be enabled to defend the suit in the interests of herself and her children; and the principle acted upon is that pending the suit her maintenance and her means of litigation shall be fully provided for. It is urged that the

(1) [1892] P. 152.

capital of the wife's separate property is sufficient to enable her to pay costs: it might just as well be urged that she ought to have no alimony pendente lite because she could maintain herself out of her capital. It has always been the practice, when the husband has ample means, to give the wife an allowance for costs, treating them as a current expense. The principle on which the Court acts are laid down in *Robertson* v. *Robertson*. (1) The Court in these cases looks to income, not to capital: *Westmeath* v. *Westmeath*. (2) Rule 158 shews that the Court has a discretion, and an appeal from a discretionary order will not be allowed. That such an order as this is discretionary is further shewn by *D'Aguilar* v. *D'Aguilar* (3); *Ronalds* v. *Ronalds* (4); *Carstairs* v. *Carstairs*. (5)

Searle, in reply.

[A. L. SMITH, L.J. If your contention is right, why was alimony ordered?]

Alimony is upon a different footing. It is granted on the principle that, pendente lite, the wife's income ought, so far as is possible, to be kept at its ordinary level. This cannot for the present purpose be considered a discretionary order: it is not a matter of discretion whether 6000*l.* is enough to pay the wife's costs of the litigation.

LINDLEY, L.J. This is an appeal by the husband from an order of Gorell Barnes, J., directing him to pay the wife's costs already incurred, and to pay or secure her costs of the hearing.

This order was made in accordance with the usual practice of the Divorce Court that the husband should be ordered to put the wife in funds to pay her costs of the proceedings. The appeal is founded on the ground that there is no occasion for such an order, as the wife has property amply sufficient to enable her to defend herself. The suit has not yet come on for trial. Alimony pendente lite has been ordered at the rate of 500*l.* per annum, and the wife's own income, arising from separate property to which she is absolutely entitled, is 280*l.* a year. The order for alimony was made after considering the incomes of herself and

(1) 6 P. D. 119.
(2) 2 Hagg. Suppl. 134.
(3) 1 Hagg. 788.
(4) Law Rep. 3 P. & D. 259.
(5) 3 Sw. & Tr. 538.

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her husband, hers being 280*l.* and his about 4000*l.* a year. After this the wife took out a summons for the husband to shew cause why he should not pay her costs up to the setting down for trial, and pay into Court or secure a sufficient sum to cover her costs of the hearing. The matter was referred to the registrar, who, after considering the income of the husband and the income of the wife, including the allowance for alimony, submitted that the husband should be ordered to pay the wife's costs already incurred, and to pay or secure the costs of the hearing. Gorell Barnes, J., made an order in conformity with this report.

Whether this order is right depends on rule 158 of the Rules and Regulations of December 26, 1865. That rule, as amended in 1875, is as follows. [The Lord Justice read the rule.]

Under that rule it is obvious that the judge has a discretion, not merely as to the amount, but as to whether an order ought under the circumstances to be made at all against the husband. I will assume that the present case is not within s. 49 of the Judicature Act, which prohibits appeals as to costs; for that section may perhaps be held not to apply to an order made pendente lite to pay costs or secure costs. Still the order is a discretionary order, and we should not interfere with it unless the judge has gone on a wrong principle, or gone so far wrong as to cause a miscarriage of justice. Mr. Searle contends that the judge has gone on a wrong principle, for that on the question whether the husband shall be ordered to pay or secure the wife's costs the relative means of the parties ought not to be taken into consideration, and that the only question is whether the wife has property enough to enable her to pay her own costs. But the more I consider the case the more I think that the judge was right in considering their relative incomes. If we were to disturb the order as to costs, we should indirectly disturb the order as to alimony; for if we were to make an order which would have the effect of reducing the wife's separate income by making it liable to costs, we should in fact be reducing the alimony. In considering the question of alimony, the Court must consider the relative incomes, and so, reasoning back, since an order as to the wife's costs must affect the order for alimony, I cannot say

that the judge was wrong in considering the relative incomes on the present occasion.

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A. L. SMITH, L.J. It is contended that the judge has gone wrong in principle. In August last the wife took out a summons against her husband with reference to her costs. It was referred to the registrar, who reported that the husband had an income of about 4000*l.* a year, out of which he had to pay 500*l.* a year for alimony, and that the wife had separate property bringing in 280*l.* a year, in addition to the 500*l.* a year alimony. Gorell Barnes, J., made an order directing the husband to pay the wife's costs up to the hearing and to secure her future costs. It is contended that this is wrong because the wife has separate property sufficient to pay costs. But if we look at rule 158 we shall see that Gorell Barnes, J., was right. [The Lord Justice read the rule.]

Now, in the proviso to this rule "having separate property" must be read "having sufficient separate property." What is "sufficient" separate property? According to Mr. Searle's argument, no order can be made against the husband if the wife has property which can be charged with her solicitor's costs, and is sufficient in amount to pay them. I do not think that the true meaning of the rule. An order has been made for alimony, and if we were to reverse the order now appealed from the alimony of 500*l.* a year, which was considered just when the wife had a free 280*l.* a year of her own, would have to be adjusted. I think it was for Gorell Barnes, J., to decide what was sufficient separate property to make it right to refuse an order for costs pending suit. He may take into consideration what the husband has, but the main point is, Has the wife sufficient separate property to prevent the order from being made? Of that question he is the judge, and we cannot say that in deciding as he has he has done wrong in taking into consideration the relative means of the parties.

DAVEY, L.J. Primâ facie, a husband suing his wife is, by the practice of the Divorce Court, liable to be ordered to make provision for her costs. Whether there are circumstances sufficient

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to take a case out of that rule it is for the judge of the Court below to say. If it were shewn that Gorell Barnes, J., went on a wrong principle or took circumstances into consideration which he ought not to have taken into consideration, the appeal ought to succeed; but whether as to amount he exercised his discretion wisely is a question with which we ought not to interfere. It has been contended that the decision went on a wrong principle, because it was founded on the relative incomes of the husband and wife, which it is said ought not to have been taken into consideration. Now, what was it the learned judge had to decide? Whether the wife had a sufficient separate income to induce the Court to abstain from making an order for her costs. In my opinion, before coming to a conclusion on that, the income of the husband ought to be taken into consideration, for the means of the wife to defend the action must in some measure depend upon what is necessary for her maintenance, and the wife of a man with 4000*l.* a year is entitled to spend more on her maintenance than the wife of a poorer man. Again, the alimony was settled with regard to the husband's means, and to alter the order now under appeal would practically interfere with the alimony. I am of opinion that Gorell Barnes, J., took nothing into consideration which he ought not to have taken, and that his discretion ought not to be interfered with.

Appeal dismissed.

Solicitors: *J. B. Roberts, for G. J. Simpson, Sheffield; F. A. K. Doyle.*

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Jan. 23, 24;
Feb. 5.

Admiralty — Practice — Foreign Ship — Actions for Necessaries — Insufficient Proceeds — Priorities.

The plaintiffs instituted in the High Court an action in rem for necessaries against the owners of a foreign steamship, and arrested the vessel the same day.

Three other actions for necessaries were subsequently commenced against the owners of the same vessel in a county court, and, after judgment in these actions had been obtained by consent, the plaintiffs obtained judgment by default for the amount of their claim, with interest and costs, but without prejudice to other claims against the vessel, and reserving all questions as to priorities.

The vessel was sold, with the consent of the plaintiffs, in a wages action, which admittedly had priority, the proceeds paid into Court, the three county court actions transferred to the High Court, and the question of priorities referred to the registrar.

The plaintiffs, in respect of the balance of the proceeds, which was insufficient to meet all the claims, and as against the other necessaries actions, claimed priority on the ground that they held security by reason of the relation back of their judgment to the date of the institution of the action and of the arrest:—

Held, by the President (Sir F. H. Jeune), confirming the report of the registrar, that the claimants in the necessaries actions were entitled to be paid out of the balance of the proceeds pro ratâ, for, in such cases, the Court holds the property, not only for the first plaintiff, but also for, at least, all creditors of the same class, who assert their claims before any unconditional decree is pronounced.

Semble, a decree in unconditional terms would, so long as the funds remained in the hands of the Court, be modified so as to let in others, who, without laches, put forward claims of a like character.

Summons (adjourned into Court) for directions as to the priorities in certain actions for necessaries.

The facts were shortly as follows:—

On August 10, 1893, an action in rem for necessaries was instituted in the High Court by the plaintiffs, John Fry & Co., coal merchants, of Cardiff, against the owners of the Portuguese steamship *Africano*. On the same day a warrant was issued and the vessel arrested by telegram from the marshall to the collector of customs at Liverpool. On October 30 judgment was obtained by default for 854*l.* 12*s.* 7*d.*, and the *Africano* was condemned in

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that amount with interest at 4 per cent. from the date of the judgment until payment, and costs, but without prejudice to other claims against the vessel, and reserving all questions as to the priority of such claims.

On August 11 an action for necessaries was commenced in the Liverpool County Court by the Bute Dry Docks Company, and the vessel was arrested by warrant issued the same day, but the man placed on board by the high bailiff was withdrawn when it was found that the vessel was in the custody of the marshall of the High Court. On October 19 judgment was obtained by consent for 146*l.* 14*s.* 6*d.* and 13*l.* 7*s.* 10*d.* costs.

On August 12 an action for necessaries was commenced in the Liverpool County Court by Grayson & Co., and the vessel arrested by warrant the same day. On August 24 judgment was obtained by consent for 88*l.* 16*s.* 2*d.*, with 13*l.* 12*s.* 8*d.* costs, and the vessel released on September 15.

On August 15 an action for wages, amounting to 129*l.* 16*s.* 2*d.*, was commenced by José Alexandre Rodriguez, the master, and others, the officers and crew of the *Africano*, in the Liverpool District Registry, and a caveat against release issued the same day. On August 24 an admission of liability and agreement of reference was filed. On October 4, on a summons taken out for that purpose, the report of the district registrar (dated September 28) was confirmed by the vacation judge (Kennedy, J.), the *Africano* condemned in the amount therein found due, with costs of the action and reference, and, by the same order of that learned judge, with the consent of the plaintiffs, John Fry & Co., the *Africano* was appraised and sold (on November 2) at Liverpool, realizing 1380*l.*, subject to the marshall's charges of 164*l.* 13*s.* 7*d.* The net proceeds, 1215*l.* 6*s.* 5*d.*, were brought into Court to the credit of this action, and by the same order of Kennedy, J., in the event of a person being procured to pay the wages found due by the report, that person was to have a first charge upon the proceeds of sale with interest at 5 per cent.

On August 17 an action for necessaries was commenced in the Liverpool District Registry by F. Zagury & Co. for 211*l.* 1*s.* 11*d.*, in which action judgment has not yet been given.

On September 16 an action for necessaries was commenced in

the Liverpool County Court by Hartman & Co., and on September 29 judgment was obtained by consent for 30*l.* 4*s.* and 6*l.* 3*s.* 8*d.* costs.

On November 13 the plaintiffs in the wages action moved for an order for the transfer of the Liverpool County Court actions to the Liverpool District Registry, and a reference of all questions of priorities to the Liverpool District Registrar; but the President ordered the actions in the Liverpool District Registry to be transferred to the Principal Admiralty Registry, and the Liverpool County Court actions to be transferred to the Admiralty Division of the High Court, and the learned judge referred the question of the priority of the claims against the *Africano* to the Admiralty registrar. (1)

At the reference it was admitted that as the plaintiffs John Fry & Co. had first arrested the vessel, they were entitled to priority in respect of their costs up to arrest, and that José Rodriguez and others were entitled next in priority to their costs up to the date of the order for sale, as also to the balance of their costs and the amount of their claim for wages in precedence of the actions for necessaries; but, as regards the balance of the proceeds, it was contended on behalf of the plaintiffs John Fry & Co. that priority depended upon the date of the writ and arrest, and *The Cella* (2) was quoted as shewing that the judgment ought to date back to the arrest, so that their action for necessaries had priority. On behalf of Grayson & Co., who had first obtained judgment, it was however contended that priority depended upon the date of judgment, and the following cases were cited in support of that view: *The Saracen* (3); *The Desdemona* (4); *The William F. Safford.* (5)

On December 16 the registrar made his report. He was of opinion that *The Cella* (2) laid down no rule as to competing claims for necessaries, and that, though in *The Saracen* (3) and *The William F. Safford* (5) precedence was given to the plaintiffs

(1) The Bute Dry Docks Company was not represented when this order was made; but their action was subsequently transferred on their own application, in order that their claim might be dealt with at the same time.

(2) 13 P. D. 82.

(3) 4 Notes of Cases, 498; 6 Moo. P. C. 56; 2 Wm. Rob. 451.

(4) Sw. 158.

(5) Lush. 69.

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who had obtained a decree, yet in *The Saracen* (1) the competing claims were for damage, not necessaries, and there was clearly laches on the part of the second plaintiffs. In *The William F. Safford* (2) priority was given over other claims for necessaries to the plaintiff who, according to the old practice, had obtained a primum decretum, that is, a provisional decree which gave him possession of the vessel with a view to a sale, whilst in what seems to have been a similar case (*The Desdemona* (3)) Dr. Lushington refused to give priority to the plaintiffs who first commenced their suit, and decreed a pro ratâ division amongst all the claimants.

The registrar further stated that the usual practice of the Court had been, where there were proceeds to be disposed of, and various claims upon them, to make the decree in each case without prejudice to other claimants, and, with regard to priorities, it had been the practice in the registry to treat the various claims for necessaries as entitled to share in the proceeds rateably, unless any claimant was disentitled by reason of laches. (4)

On the ground, therefore, that all the actions were instituted within less than six weeks, and that the earlier judgments were obtained by consent in the county court, before sufficient time had elapsed for those plaintiffs, who were proceeding in poenam in the Admiralty Division, to obtain a decree in the ordinary course, the registrar reported that in his opinion the claims ranked and were payable out of the proceeds in Court in the following order:—

First, the costs of the plaintiffs John Fry & Co. up to and inclusive of the arrest of the vessel in that action. Secondly, the costs and claim of José Rodriguez and others in the wages action. Thirdly, the balance of the costs of the plaintiffs John Fry & Co., and the respective costs of the other necessaries actions (excluding that of August 17) to be paid pari passu. Fourthly, the claim of the plaintiffs John Fry & Co., and of the other plaintiffs in the necessaries actions, to be paid out of the

(1) 4 Notes of Cases, 498; 6 Moo. P. C. 56; 2 Wm. Rob. 451.

(2) Lush. 69.

(3) Sw. 158.

(4) As in the case of the claimants F. Zagury & Co., who had not yet obtained judgment.

balance pro ratâ, in accordance with the practice in the registry, except the claim of the plaintiffs in the action of August 17, in which judgment had not yet been obtained.

On December 22 the plaintiffs John Fry & Co. filed a notice of objection to the registrar's report, and on January 3 took out a summons for directions: first as to payment of the amounts due to the crew of the *Africano* (1), and secondly, as to the method in which the question of priorities was to be determined. This summons was adjourned into Court without formal notice of motion or pleadings.

Jan. 23, 24. *Sir Walter Phillimore*, and *F. Laing*, for the plaintiffs John Fry & Co., in objection to the report, so far as regarded the priorities of the claims for necessaries: the *Africano* remained under arrest in Fry & Co.'s action, but could not be sold in that action, as the time allowed in the case of proceedings by default had not elapsed. The vessel has, however, with Fry & Co.'s consent, been sold in the wages action, and, the proceeds being in Court, the claims for necessaries, in respect of which actions have been brought, will take priority inter se, in the order of the institution of the actions.

Before *The Heinrich Björn* (2) it was supposed that a claim for necessaries conferred a maritime lien, and the alleged practice of pro ratâ distribution amongst necessaries men may have its origin in the view the Court took that maritime liens arising ex contractu were equal and co-ordinate. According, however, to the law as now interpreted, the right given by 3 & 4 Vict. c. 65, s. 6, is that of a lien arising on the institution of the action, that institution conferring on the creditor a right in the nature of a charge, and creating a security for his debt which, like a mortgage, ranks in order of date as against other claims of equal rank. The practice of distributing proceeds pro ratâ among

(1) It was admitted that the Portuguese Consul was entitled to the amounts advanced by him under the order of Kennedy, J., to pay the crew and send them back to Lisbon, and the claim of the engineers who remained in England to continuing wages up to actual payment was compromised. The facts and arguments of counsel on this point are therefore omitted as not material for the purposes of this report.

(2) 11 App. Cas. 270.

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claimants of equal rank, irrespective of date, is inconsistent with *The Cella* (1), where the nature of the right is defined. It is there shewn that the lien takes effect from the moment of arrest, and that the judgment relates back to the arrest. The result is that the creditors' charge is effectual against all others of equal rank from the time of the arrest.

The rule of pro ratâ distribution adopted by such statutes as, for example, those governing bankruptcy, nevertheless recognises the secured creditor and gives him the benefit of his security.

Pickford, Q.C., and *A. D. Bateson*, for the master and crew of the *Africano*, proceeding for their wages, and for some of the necessaries claimants, supported the registrar's report, contending that priority rested on diligence, not on lien, and that in the present case the dates of the institution of the actions for necessaries being all close together shewed equal diligence, and therefore they should all rank pro ratâ. They further contended that there is no direct decision that a prior arrest gave priority where there was due diligence. *The Cella* (1) only shewed that the security, not priority, dated from the writ, and when priority was given according to the date of the judgment, there was only one Admiralty Court; so that the rule was at that time an indication of diligence, and was not applicable now.

[They referred to the cases already mentioned in the report of the registrar and in addition to *The Queen* (No. 2, Irish) (2); *The Markland* (3); *The Turliani.* (4)

H. Holman, for the Bute Dry Docks Company, also supported the registrar's report.

Sir Walter Phillimore, in reply.

Cur. adv. vult.

Feb. 5. THE PRESIDENT (SIR FRANCIS H. JEUNE). In this case the one point actually raised for decision is perhaps a novel, but certainly a narrow one. It is whether, where a vessel has been sold and the proceeds brought into Court, claims for necessaries, in respect of which actions have been brought,

(1) 13 P. D. 82.
(2) 3 Mar. Law Cas. 189.
(3) Law Rep. 3 A. & E. 340.
(4) 2 Asp. M. L. C. 603.

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take priority inter se in the order of the institution of the actions.

The question arises on a report from Mr. Registrar Smith with regard to the distribution of the proceeds of the ship *Africano*, which was sold by order of Kennedy, J., on October 4, 1893, and the proceeds, amounting to 1215*l.* 6*s.* 5*d.* net, brought into this Court. An action for necessaries had been instituted against the vessel in the High Court on August 10, 1893, another such action in the Liverpool District Registry on August 17, and three such actions in the Liverpool County Court on August 11, August 12, and September 16, respectively. On November 13, all these proceedings were transferred by order to the High Court.

It was contended by one set of claimants before the registrar that priority of distribution followed priority of writ; by the other that it followed priority of judgment. The registrar, in an excellent report, decided that neither contention was correct, and that the fund should be distributed as between these claimants pro ratâ.

The only appeal brought before me is by John Fry & Co., who before the registrar contended in favour of priority of writ. The view of their counsel, as I understand it, was based mainly on one argument of principle, and one authority. They said that before the judgment in *The Heinrich Björn* (1) it was supposed that a claim for necessaries conferred a maritime lien, but that now the law is that the only lien for necessaries arises on the institution of the action, that a security is obtained on such institution, and that, accordingly, securities so created rank, like mortgages, in the order of their dates. The case of *The Cella* (2), they contended, was decided according to this principle.

But I cannot agree with this argument. There seems to me to be an obvious link wanting. If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessaries to the date of action brought in respect of it, we should expect to find it held in the less enlightened period

(1) 11 App. Cas. 270. (2) 13 P. D. 82.

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before *The Heinrich Björn* (1), that funds in Court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judge, from some of whose decisions a belief is said to have arisen that the statute 3 & 4 Vict. c. 65, s. 6, conferred a maritime lien on claims for necessaries. In *The Desdemona* (2), decided in 1856, Dr. Lushington said, in a suit for necessaries, that "the Court would give priority to any party first obtaining a judgment." In *The William F. Safford* (3), decided in 1860, Dr. Lushington said: "The Court encourages suitors in actively enforcing their remedy, and gives preference to the party who is first in possession of a decree of the Court." It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority. The same view was taken in an Irish case decided in 1869, *The Queen.* (4) Nor in the instances of claims arising from collision was preference ever given to the claimant who first became a suitor. It is probable that before the case of *The Bold Buccleugh* (5), finally decided in 1852, the view accepted in this Court was that the lien came into existence only with the suit. If so, the authorities which shew that in cases of collision a decree, and not the issue of a writ, gave priority, are also authorities against the argument of counsel for Fry & Co.: see *The Saracen* (6) and *The Clara* (7), the former decided before, and the latter after, *The Bold Buccleugh.* (5)

It appears to me that the case of *The Cella* (8) has no real bearing on this point. The question there was whether, when a ship had been arrested in an action for necessaries, and the company to whom she belonged was subsequently wound up, the official liquidator had a claim on the sum representing the value of the ship in the hands of the Court as against the plaintiff. It is true that it was held in that case by the then President that the plaintiff had "a security arising at the commencement of

(1) 11 App. Cas. 270.
(2) Sw. 158.
(3) Lush. 69.
(4) 3 Mar. Law Cas. 189.
(5) 7 Moo. P. C. 267.
(6) 4 Notes of Cases, 498; 6 Moo. P. C. 56.
(7) Sw. 1.
(8) 13 P. D. 82.

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the action in rem." But it is quite a different thing to say that such a security takes priority over securities of the same kind arising subsequently in a similar manner. The rationale of the decision in that case appears to me to be expressed by Fry, L.J., in approving in this case, as he had previously done in *The Heinrich Björn* (1), the dictum of Dr. Lushington in *The Volant* (2): An arrest "offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment," and adding, "The arrest enables the Court to keep the property as security to answer the judgment." (3) This does not at all imply that the Court holds the property only for that plaintiff, or for that plaintiff in priority to others of the same class. The true view is, I think, that the Court holds the property, not only for the first plaintiff, but also for at least all creditors of the same class who assert their claims before any unconditional decree is pronounced. The language of Dr. Lushington in *The Clara* (4), indicating that the Court would have power to delay pronouncing a decree in the first till it could also be pronounced in a subsequent action, so "that both parties might share proportionably," is an authority for this proposition.

It is not necessary in this case to decide whether priority in distribution follows priority in judgment. I think it is clear that in the cases to which I have already referred, and especially in the decision of the Privy Council in the case of *The Saracen* (5), that a creditor who had obtained a final decree held its fruits against another creditor of the same class who commenced his action subsequently to such decree. The learned registrar suggests, no doubt on the authority of the language employed by Sir Robert Phillimore in *The Markland* (6), that all that this means is that a plaintiff who is guilty of laches loses his right of equality. I am not sure, however, that this sufficiently explains the cases in question or the practice formerly recognised. In Coote's Admiralty Practice, 2nd ed. p. 133, it is stated that "According to the priority of time in which each claimant has obtained his decree, pronouncing for his claim and

(1) 10 P. D. 44, at p. 54.
(2) 1 Wm. Rob. 383.
(3) 13 P. D. at p. 88.
(4) Sw. 1, at p. 7.
(5) 6 Moo. P. C. 56.
(6) Law Rep. 3 A. & E. 340, at p. 343.

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costs, so will be his right to be paid in preference to the others (where there are several actions) out of the fund in court." But what I think is to be observed in all these cases is that the decree was apparently an unconditional decree. At a later period, to judge from what was said in the *The Markland* (1), decided in 1871, these decrees were sometimes conditional, sometimes unconditional. I have looked at the original decree pronounced in the case of *The Saracen* (2) on May 6, 1845, in favour of the claimants then before the Court, and find it was an unconditional decree. The decree of February 2, 1860, in *The William F. Safford* (3), was also unconditional. At the present time the decree in this court in an action for necessaries is either conditional in any case, or certainly, if there is any reason to suppose there may be other claims of equal rank; and, even if the decree were in any instance made in unconditional terms, I am inclined to think that so long as the funds remained in the hands of the Court it could and should be modified so as to let in other persons, who, without laches, put forward claims of a like character. In this instance the judgment given on October 30 in this Court, following the usual form, was expressly "without prejudice to other claims against the said vessel, and reserving all questions as to the priority of such claims"; and, no doubt, by reason of such judgments being usually, if not always, in similar terms, there exists, as there did not at the date of *The Saracen* (2), a practice of proportionate division. As far, therefore, as the High Court is concerned, this question of priority of judgments has ceased to be a practical one. There may, however, remain a question whether when, as in the present case, a judgment has been obtained in a county court, and the action is subsequently transferred to this court, such a judgment gives any priority? It is not now necessary to adjudicate upon that question; but should it arise for decision, it would be worth while to consider whether the plaintiff in the county court action could be admitted to share in the proceeds in the High Court except on terms of equality with the suitors in that court.

The result is that the objection to the report by Fry & Co.

(1) Law Rep. 3 A. & E. 340, at p. 342.

(2) 4 Notes of Cases, 498.

(3) Lush. 69.

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will be overruled with costs. The report of the registrar will be confirmed, and the costs of the reference will follow the claims in each case.

Solicitors for plaintiffs, John Fry & Co.: *Botterell & Roche, for Vaughan & Hornby, Cardiff.*

Solicitors for master and crew of the *Africano*, and for Grayson & Co. and Hartman & Co.: *Bateson, Warr, & Bateson.*

Solicitors for Bute Dry Docks Company: *Downing, Holman & Co.*

Solicitors for other necessaries claimants: *Pritchard & Sons; Maudes & Tunnicliffe.*

Solicitors for defendants, the owners of the *Africano: Sampson, Williamson, & Inglis.*

T. L. M.

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[IN THE COURT OF APPEAL.] *Applied.* DECD. *In re R.*, [1951] P. 10

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Dec. 19, 20.

TYRRELL *v.* PAINTON AND ANOTHER.

Probate—Will—Onus probandi—Will prepared under Suspicious Circumstances.

The rule throwing upon the party propounding a will prepared by a person who takes a benefit under it the burden of shewing that the paper propounded expresses the true will of the deceased, is not confined to cases where the will is prepared by a person taking a benefit under it, the true rule to be deduced from *Barry* v. *Butlin* (2 Moo. P. C. 480), *Fulton* v. *Andrew* (Law Rep. 7 H. L. 448), and *Brown* v. *Fisher* (63 L. T. 465) being, that wherever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument.

At the trial of an issue as to the validity of a will, it appeared that the testatrix, in 1880, and again in 1884, made a will in favour of the defendant. Afterwards she became dissatisfied with him, and from 1888 to 1892 wrote repeatedly to her solicitor making serious complaints against him. On November 7, 1892, she made a will leaving her property to the plaintiff. On November 9, T. P., a son of the defendant, brought to her a will prepared by himself, leaving her property to the defendant. This will was executed by her in the presence of and attested by T. P. and a young friend of his, no one else being present, and the existence of this will was not known to any one else till after the death of the testatrix on the 23rd. The only evidence adduced by the defendant, the party setting up the later will, was that of the attesting witnesses to such will, who were orally examined, and deposed clearly that the

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will was read over to the testatrix, and that she appeared to understand it and approved of it. The President pronounced in favour of the later will:—

Held, on appeal, that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed, and that the former will must be established.

APPEAL by plaintiff from a judgment of the President pronouncing for the validity of a will of Rebecca Bye, deceased, dated November 9, 1892.

The plaintiff E. B. Tyrrell claimed probate in solemn form of a will executed upon November 7, 1892, by Rebecca Bye, of West Challow, Berkshire, widow. The defendants, J. R. Painton and J. Painton, by their defence alleged that the said will had been revoked by a will of November 9, 1892, and by counter-claim they sought to obtain probate in solemn form of the latter will. By his reply the plaintiff alleged (inter alia) that the execution of the will of November 9, 1892, was obtained by the fraud of the defendants and of one Thomas Painton; and that the deceased when she executed the last-mentioned will did not know and approve of the contents thereof.

It appeared that in 1880 and in 1884 the testatrix, who had been a widow for some years and had no issue, made wills in favour of the defendant J. Painton, with whom she was then on friendly terms, and who was a trustee of her marriage settlement. These wills were prepared by Mr. Haines, a solicitor, who usually acted for her. Subsequently the testatrix rightly or wrongly became dissatisfied with the conduct of the defendant J. Painton, and in 1891 and 1892 she wrote several letters to Haines in which she made complaints about J. Painton's conduct as such trustee. Upon October 17, 1892, the testatrix, who was then ill, wrote to Haines asking him to come and see her about making a fresh will. Subsequently, the illness of testatrix increased, and upon November 7 Haines went to her house, and from her instructions prepared a fresh will by which she devised and bequeathed the bulk of her property to the plaintiff, her cousin, whom she appointed sole executor. This will, which was the will propounded by the plaintiff, was executed by the testatrix upon the same day, and was attested by the vicar of the parish, Dr. Emmerson (who was her medical attendant), and by Haines.

On November 9, Thomas Painton, a son of defendant J. Painton, brought to the testatrix another will, which was in his handwriting, by which testatrix purported to devise and bequeath nearly the whole of her property to J. Painton absolutely, and to appoint as sole executor the defendant J. R. Painton, another son of J. Painton. This will was signed by the testatrix upon November 9, and it purported to have been attested by Thomas Painton and a young man named Peter Rowland, who was a friend of his. No one else was present at the time, and the will after the alleged execution was taken away by Thomas Painton and remained in his possession until after the death of the testatrix, which occurred upon November 23. According to the evidence of T. Painton, no one except Rowland and himself knew of the existence of this will until after the death of the testatrix.

At the trial, which took place before the President without a jury, the only witnesses called on behalf of the defendants were Thomas Painton and Peter Rowland. T. Painton stated that he heard on the evening of November 7 of the execution of the will of that date; that the testatrix sent for him upon November 8; that he then had an interview with her alone, when she told him that she was sorry she had turned against her old trustee, and that she wished to make another will like her former ones in favour of his father, J. Painton; that she then dictated to him, and he took down in pencil and afterwards wrote out in ink the provisions of the will of November 9, and that he got Rowland to come on the 9th to be an attesting witness. Both T. Painton and Rowland deposed that the testatrix thoroughly understood and approved the contents of the alleged will of November 9, when she signed it.

On behalf of the plaintiff, evidence was given by the three attesting witnesses to the will of November 7, and by a Mrs. Lester, who had nursed the testatrix during her illness. This evidence went to shew that upon November 7, and upon other days after the 9th, the testatrix had expressed continued hostility towards J. Painton and satisfaction at having executed the will of the 7th under which he took nothing. There was evidence also of complaints having been made by the testatrix that

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T. Painton, had upon November 9, brought a strange young man to her room, and that she had asked Dr. Emmerson to take steps to prevent her being disturbed again. Dr. Emmerson further stated that upon November 9 the testatrix was in an exhausted condition and drowsy.

The President held that the burden of proving that the will of November 9 was obtained by fraud, was upon the plaintiff, and that upon the balance of evidence he had not succeeded in doing this. The learned judge accordingly pronounced in favour of the will of November 9.

The plaintiff appealed.

Wheeler, Q.C., and *Howland Roberts*, for the appellant. The onus was on the persons propounding the second will to prove that the testatrix acted of her own free will and understood what she signed. That is always the case where a person draws up a will in his own favour and procures its execution by the testator. He must shew that there was no undue influence or fraud of any kind: *Brown* v. *Fisher* (1); *Parker* v. *Duncan* (2); *Fulton* v. *Andrew*. (3) But here the evidence from first to last throws the gravest suspicion upon the second will. The testatrix was not on good terms with the Painton family; she had two days before made a will in favour of other persons; after having done so she was in a very exhausted condition; and after the second will was signed she evidently did not know what she had done, and complained of a strange man coming into her room against her wish. The will was clearly the result of a fraudulent scheme on the part of Painton and his son to take advantage of her weak state.

Woodfall, for the respondents. The question is whether the attesting witnesses to the will of the 9th were guilty of an indictable conspiracy.

[LINDLEY, L.J. We are not driven into so close a corner as that. It may be said that such suspicion attaches to the execution of the second will that the burden of proof is on you to remove it.]

The President saw the attesting witnesses, each of whom was

(1) 63 L. T. 465. (2) 62 L. T. 642.
(3) Law Rep. 7 H. L. 448, 461.

examined when the other was out of Court, so that he had the opportunity of observing whether they in any respect contradicted each other. The hostility of the testatrix against Painton was not founded on facts.

[DAVEY, L.J. Does it make any difference whether her feeling was well founded or not?]

Yes, to this extent—that it was not unnatural for her old feelings of friendship to revive if she had no real ground of complaint against him, and she might then wish to undo what the Tyrrell family had over-persuaded her to do. The cases which have been referred to were all cases where the person who got the will prepared took a benefit under it, and the rule ought not to be extended to cases where he himself takes no benefit. The evidence of the attesting witnesses was given in the most satisfactory manner; they corroborated each other remarkably in minute particulars; the judge who heard them believed their evidence, and the Court will not differ from him as to their credibility. If a new trial is ordered the respondents ask for leave to amend, that they may impeach the will of the 7th as having been obtained by fraud: *Riding* v. *Hawkins*. (1)

LINDLEY, L.J. I have considered this case anxiously. It is difficult for us to dissent with any confidence from the conclusion on a question of fact at which a judge has arrived who has seen and heard the witnesses; and if the question appeared to me to turn on whether the balance of evidence was in favour of the plaintiff or of the defendants, I should have been slow to differ from the President; but so little turns upon that, and so much upon matter as to which there is no conflict of testimony, that we venture to reverse his decision.

On November 7, 1892, the testatrix, Mrs. Bye, made a will mainly in favour of the plaintiff. On the 9th she executed another will which substantially revoked the former, and gave the bulk of her property to John Painton. I see nothing to throw any suspicion on the will of the 7th, nor any reason to doubt that it expressed the testamentary intentions of the testatrix at that time. As to the will of the 9th, I cannot say the

(1) 14 P. D. 56.

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same. The circumstances under which it was executed are so strange and suspicious that I am in the greatest doubt whether she knew the effect of the document she was signing. Nobody knows what took place except Thomas Painton, and he calls in Peter Rowland, a young friend of his, to be an attesting witness. Thomas Painton appears to have found out that the will of the 7th had been made and what was its nature, and there is some evidence that he said it was a shame to turn his father out. This he denies; but it is clear that he knew enough to make him angry. What is there to shew that the testatrix had changed her mind between the 7th and the 9th? We have nothing but Thomas Painton's evidence, supported by that of Peter Rowland. There is strong evidence to shew that Mrs. Bye complained of Thomas Painton's having brought a strange young man into her room. If she had been consciously making a will on the 9th, she would not have complained of a stranger being brought to her room, nor would she have afterwards referred to her former will in the way she did. Thomas Painton took the will of the 9th away. He had no right to the possession of it. He says the testatrix told him to take it away; but we have only his word for that. Can any one doubt that Mrs. Bye did not know what she was doing when she executed this said will?

If this case had turned on the conflict of evidence, I should not have considered that we could come to a conclusion differing from that of the President; but he appears to me to have attached too little weight to the rule expounded in the cases which have been referred to. He seems to have thought that he had only to address himself to the question of fraud—whether the will had been obtained by fraud; that the burden of proving that lay on the plaintiff, and that he had not discharged himself of that burden. Now, in my opinion, this will of the 9th was executed under such suspicious circumstances that he ought to have said, "Do the defendants affirmatively establish to my satisfaction that the testatrix knew what she was doing when she executed this will?"

In *Barry* v. *Butlin* (1) Parke, B., delivering the opinion of the Judicial Committee, said: "The rules of law according to which

(1) 2 Moo. P. C. 480.

cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." The same principle was laid down and acted upon in *Fulton* v. *Andrew* (1) and *Brown* v. *Fisher* (2). None of these cases turned on the plea of fraud. Thomas Painton wrote the will, and it was in favour of his father. The testatrix had omitted him on November 7: had she by the 9th changed her mind?

The rule in *Barry* v. *Butlin* (3), *Fulton* v. *Andrew* (1), and *Brown* v. *Fisher* (2) is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. Here the circumstances under which the will of the 9th was prepared and signed are such as to cause the gravest suspicions. The doubt which they raise is not, to my mind, removed by the evidence on behalf of the defendants, and I should go further if it were necessary. Were this case tried by

(1) Law Rep. 7 H. L. 448. (2) 63 L. T. 465.
(3) 2 Moo. P. C. 480.

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a jury, if the judge were to direct them that the issue they had to try was whether the plaintiff had proved that the will of the 9th was obtained by fraud, I should say that it was a misdirection. The question for the jury would be, did the testatrix know and approve of that will, and the jury should be told that it was for J. Painton to prove that she did.

The question, then, is whether we ought to reverse the decision under appeal, or to direct a new trial. In mercy to the parties, we think that we may spare the expense of a new trial as to this very small property, and, as we have before us sufficient materials to enable us to come to a satisfactory conclusion, we pronounce in favour of the will of November 7.

A. L. SMITH, L.J. I have come to the same conclusion; and as we are differing from the Court below I desire to add a few observations. If the learned President had had his mind clearly brought to the undisputed facts of the case, including therein the letters written by Mrs. Bye, and had then addressed himself to the oral evidence, and found as he did, I should not have been disposed to interfere with his decision. This, however, was not done. The sole question laid before him was whether Thomas Painton had been found guilty of fraud. The prior issue has not been dealt with at all.

It would require much more than the evidence of Thomas Painton and Peter Rowland, considering the grave suspicions surrounding the will of November 9, to satisfy me that Mrs. Bye knew what she was about when she signed that will. On that day Thomas Painton produces to the testatrix a will drawn up by himself, leaving out the disposition in favour of Mr. Tyrrell, and substituting one in favour of his father, John Painton, and no one is present but himself and a young friend whom he called in to be an attesting witness. I agree with Lord Hatherley in *Fulton* v. *Andrew* (1) that "it would not have been difficult for them to have other persons present when the reading over of the will took place," and especially a will brought into existence as this will was. Applying the rule laid down by Parke, B., in *Barry* v. *Butlin* (2), I cannot possibly say that the suspicion

(1) Law Rep. 7 H. L. 472. (2) 2 Moo. P. C. 480.

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A. L. Smith, L.J.

attaching to the will is removed, and that I am judicially satisfied that the will of the 9th expresses the true will of the deceased.

Before the question of fraud can arise, the suspicion arising from the circumstances under which the will of the 9th was executed has to be dealt with and removed, and this has not been done. If the learned President had found as a fact that the suspicious circumstances had been explained, and had then gone on to find as he did that he could not upon the evidence hold that Thomas Painton had been guilty of fraud, I should have had great difficulty in disagreeing with such findings; but as the first is wholly untouched, and the undisputed facts are clear, I think that this appeal must be allowed. I entirely agree with the principle deduced by Lindley, L.J., from the authorities which have been referred to.

DAVEY, L.J. I entirely agree, and as the judgments already delivered fully express my view, I should add nothing, were we not differing from the judge of the Court below on a question of fact where he had seen and heard the witnesses.

If this had been merely a case of drawing a different conclusion from the evidence, I should have been slow to differ from the President merely because I thought that on the evidence as it appears on paper I should have come to the opposite conclusion. The question appears to me to be whether the learned judge applied his mind to the right issue. If the case had been tried by a jury, and he had directed them that what they had to try was whether Tyrrell had made out to their satisfaction that the will of November 9 was obtained by fraud, I should have said that this was a misdirection. There rests upon that will a suspicion which must be removed before you come to the plea of fraud. It must not be supposed that the principle in *Barry* v. *Butlin* (1) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour

(1) 2 Moo. P. C. 480.

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of it unless that suspicion is removed. Here the circumstances were most suspicious, and the question a judge has to ask himself is whether the defendants have discharged themselves of the onus of shewing the righteousness of the transaction, and without going again over the circumstances which have been referred to, I am compelled to say that they have not. The evidence of Thomas Painton and Rowland is in my opinion quite insufficient to remove the suspicion; and as to the suggestion that Mr. Tyrrell induced Mrs. Bye by cajolery to make the will of the 7th in his favour, there are no materials before us which appear to me to lay the slightest ground for such a suspicion. I agree, therefore, in pronouncing in favour of the earlier will.

Appeal allowed.

Solicitors: *Wood, Bigg, & Nash, for Haines, Farringdon; Tarry & Sherlock.*

H. C. J.

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Feb. 5.

IN THE GOODS OF LEESE.

Administration—Person "not lawfully detained as a Lunatic and not found a Lunatic by inquisition, but through mental infirmity arising from age incapable of managing his affairs"—Person appointed to act with the powers of a Committee—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*d*), *sub-s.* 2—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The sole next of kin of a deceased intestate was a person "not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing her affairs," within the meaning of sub-s. 1 (*d*) of s. 116 of the Lunacy Act, 1890. Her estate was administered by a person appointed to act with the powers of a committee under sub-s. 2 of such section.

The Court made a general grant of administration, under s. 73 of the Court of Probate Act, 1857, to the person thus appointed for the use and benefit of the next of kin.

APPLICATION for administration.

Jessie Leese died intestate, a lunatic. The estate, which was in Court, consisted of about 1900*l.* in New Consols. The sole next of kin was her sister Mary Leese. Mary Leese, who was ninety-four years of age, had been declared by an order in Lunacy to be "though not lawfully detained as a lunatic, and not found a lunatic by inquisition, through mental infirmity arising from

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age incapable of managing her affairs" within the meaning of sub-s. 1 (*d*) of s. 116 of the Lunacy Act, 1890. Alice Louisa Meinertzhagen, the applicant, had been appointed to receive the income to which Mary Leese had been entitled, and to manage her estate pursuant to sub-s. 2 of such section. She was the committee of the estate of the deceased intestate.

Bargrave Deane, in support of the application. The applicant has under the sub-section the powers of a committee. A grant ought, therefore, to be made to her, for the use and benefit of the next of kin. It is submitted that such grant should be general, and not, having regard to the advanced age of the next of kin, limited to her lifetime. [He referred to the cases of *In the Goods of Mary Burrell* (1) and *In the Goods of Eccles.* (2).]

THE PRESIDENT made a general grant of administration, under s. 73 of the Court of Probate Act, 1857, to the applicant for the use and benefit of the infirm next of kin.

Solicitor for applicant: *R. S. Gregson.*

H. D. W.

Applied. ELWES *v.* ELWES. [1950] 1 All E.R. 826.

Followed. E. *v.* E. [1950] P. 232

ROGERS *v.* ROGERS (THE QUEEN'S PROCTOR SHEWING CAUSE).

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Jan. 20, 24.

Divorce—Wife's Petition—Adultery and Cruelty—Decree Nisi—Collusion and Condonation after Decree Nisi—Intervention—Matrimonial Causes Act, 1860 (23 & 24 *Vict. c.* 144), *s.* 7—"*Material Facts not brought before the Court*"—*Pleadings—Adultery subsequent to Condonation—Revival—Rescission of Decree—Practice—Costs.*

A wife having obtained a decree nisi for the dissolution of her marriage upon the ground of adultery and cruelty, the Queen's Proctor intervened to shew cause why the decree should not be made absolute, alleging that the decree had been obtained by the suppression of material facts; that the petition had been prosecuted in collusion with the respondent; and, that, since the date of the decree, the petitioner had condoned the adultery and cruelty upon which the decree was based. The petitioner, after denying the allegations of the Queen's Proctor, pleaded that if she had condoned the acts of adultery and cruelty upon which the decree was founded, such condonation had been cancelled, and her right to complain of the said offences had been revived by acts of adultery committed by the respondent subsequently to such condonation.

Upon findings of fact that there had been condonation since the decree nisi,

(1) 1 Sw. & Tr. 64. (2) 15 P. D. 1.

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and collusion to suppress the fact of such condonation, and that the respondent, after the said collusion and condonation had taken place, had committed adultery, the Court, in rescinding the decree and dismissing the petition:—

Held, that the collusion to suppress the fact of condonation having taken place after decree nisi was a sufficient ground for refusing to make the decree absolute, and facts establishing such collusion were "material facts" within the terms of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, which the Queen's Proctor was right in bringing to the knowledge of the Court, inasmuch as, the decree nisi being only the inchoate part of the decree, and the suit not being completed until after decree absolute, the petition, although not presented, had been prosecuted in collusion:

Held, also, that such collusion might also be brought forward by the Queen's Proctor under the latter part of s. 7 of the Act of 1860, and formed ground for rescinding the decree nisi:

But, *held*, that where there has been adultery, which has been condoned by the petitioner, such condonation, if followed by other acts of adultery on the part of the respondent, forms no ground for rescinding the decree nisi.

Moore v. *Moore* ([1892] P. 382) followed.

THIS was the hearing of the Queen's Proctor's intervention in suit where the wife had obtained a decree nisi on the ground of adultery and cruelty of her husband.

On June 1, 1892, the wife filed her petition, alleging that her husband had frequently during 1891, and upon April 7, 1892, committed adultery with Isabella Crompton; that he had also committed adultery with women unknown; and that on May 22, 1892, and for two years prior to the petition, he had treated his wife with cruelty; and she prayed the Court to dissolve the marriage.

The respondent made no defence, and on November 14, 1892, the Court pronounced a decree nisi.

On June 6, 1893, the Queen's Proctor filed his plea, alleging: (1.) That the decree was obtained contrary to the justice of the case by withholding from the knowledge of the Court material facts, which were thereinafter more particularly set forth. (2.) That the petition had been prosecuted in collusion with the respondent. (3.) That since November 14, 1892, the petitioner had condoned the adultery (if any) and the acts of cruelty (if any) committed by the respondent. And the Queen's Proctor prayed the Court to rescind the decree nisi, to dismiss the petition, and to condemn the petitioner in the costs of the Queen's Proctor.

The petitioner, in her answer, filed on July 21, 1893, denied

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each and all of the allegations contained in the Queen's Proctor's plea.

On January 12, 1894, the petitioner, by leave, amended her answer by adding thereto the following paragraph: "That if the petitioner condoned the adultery and the acts of cruelty committed by the respondent, such condonation has been cancelled, and the petitioner's right to complain of such adultery and acts of cruelty has been revived by the respondent's adultery subsequent to such alleged condonation."

The Queen's Proctor's reply to the amended answer was as follows: "The subsequent adultery of the respondent alleged in the amended answer (the commission of which by the respondent the Queen's Proctor does not admit) is no answer in law to the plea of the Queen's Proctor."

At the hearing, evidence was adduced by the Queen's Proctor for the purpose of shewing that the petitioner, after the commencement of the divorce proceedings, had condoned the adultery charged in the petition. But it appeared from the evidence of witnesses, called on behalf of the petitioner, that, subsequently to the alleged condonation, the respondent had lived with a woman who passed as his wife, and who was not the petitioner.

Pickford, Q.C. (*T. S. Little*, with him), for the petitioner. It cannot be disputed that if the petitioner were to file a fresh petition on the facts now before the Court, there would be absolutely no defence to it. It would be a remarkable result, were the Court now to deprive the petitioner of the remedy to which she would be entitled to-morrow upon the same set of facts.

[THE PRESIDENT. If there has been an agreement to conceal material facts, would that not be collusion? And, if there has been collusion, must not the decree absolute be refused?]

There is no case in which a decree nisi has been rescinded on the ground of collusion between the parties after the decree was pronounced.

[THE PRESIDENT. What distinction is there between collusion and adultery after decree nisi?]

The Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7,

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deals, in the first portion, with collusion in obtaining the decree nisi; the second part of the section goes on to deal with interventions after decree nisi. It is a question whether the second part is intended to do more than enable the Queen's Proctor to intervene, instead of one of the public; and, if so, the collusion referred to in the first part of the section is confined to collusion in obtaining the decree. A distinction seems to be drawn between collusion and the suppression of material facts.

[THE PRESIDENT. Is not that the fallacy that underlay the argument of the petitioner in the case of *Butler* v. *Butler* (1)? If the "material facts" are directed to adultery or connivance, it may well be that, unless they establish the charge in either of those cases, there may be no ground for refusing a decree. But if the question is one of collusion, are not the facts establishing that "material facts"?]

In *Butler* v. *Butler* (1) the collusion was in obtaining the decree nisi. There may, in fact, be no real difference, but the section draws a distinction. The facts are only "material facts" if, in the event of their having been laid before the Court at the hearing of the petition, the Court would have refused the decree nisi. If all the facts now in evidence had been laid before the Court, it would still have granted the decree nisi in this case. This concealment was only for a time. It has ceased. Is it to be held that a petitioner, under these circumstances, is to be debarred for ever from obtaining relief? The words of the section are, "for the purpose of obtaining a divorce contrary to the justice of the case." The Court has, therefore, to consider whether it is contrary to the justice of this case that a divorce should be granted. In order to find collusion, the Court must be satisfied that there was an intention to deceive. There was, here, no such intention. It is admitted that the petitioner would be entitled to relief upon the existing facts if she were to present a fresh petition, and it would require a strong case to induce the Court to deprive her of relief upon the present petition.

Inderwick, Q.C., and *Guy Stephenson*, for the Queen's Proctor. If the Court comes to the conclusion that there has been condo-

(1) 15 P. D. 66.

nation, it will also find that there has been collusion. *Alexandre* v. *Alexandre* (1) does not go as far as the petitioner must ask the Court to go in the present case. The collusion dealt with in s. 7 is collusion either before the decree nisi or afterwards. The Queen's Proctor and the Attorney General, upon whose fiat he acts in these interventions, desire the opinion of the Court as to whether adultery, which has been condoned, can be revived in the manner now suggested, and, whether it is competent for the Court to take notice of the subsequent adultery for the purpose of granting a decree; or whether, on the other hand, there must be a fresh suit.

[THE PRESIDENT. Is not that covered by *Moore* v. *Moore*? (2)]

The Queen's Proctor did not oppose the decree in that case, being satisfied that all the parties had acted with perfect bona fides. There had, moreover, been no attempt at secrecy. A distinction is drawn in *Collins* v. *Collins* (3), and also in the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), between condonation of adultery and condonation of other matrimonial offences. The point was commented upon in the House of Lords. The case was discussed upon the law of England and the law of Scotland, as applicable to revival of adultery which had been condoned. Condonation is a bar, because it is condonation of the adultery upon which the decree nisi was granted. The adultery alleged in the petition is entirely got rid of by the condonation, and the subsequent adultery of the husband would only give the wife a right to petition the Court, either by means of a fresh suit, or, if the Court thinks fit, by supplemental petition. This is not a question of cruelty having been condoned and revived. The Act must be taken to mean that there must be some act of adultery which has not been condoned when the decree is made. If the Court had decided, as was argued in *Collins* v. *Collins* (4), that they could not go behind the decree nisi, all these questions would not be material; but the Court took the view that the suit was subsisting until after decree absolute, and that anything which occurred between the parties might be inquired into before the decree absolute.

(1) Law Rep. 2 P. & D. 164.
(2) [1892] P. 382.
(3) 9 App. Cas. 205, at p. 241.
(4) 9 App. Cas. 205.

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The difficulty about the ecclesiastical cases is that, in those Courts, a woman was only entitled to a divorce à mensâ et thoro, but she was entitled to that upon the ground of cruelty, and it is difficult to understand why those Courts should have gone into charges of both cruelty and adultery, when the wife, who was petitioning, was entitled to her decree upon proof of one offence only. Possibly, she was entitled to more alimony if she proved two offences. But, in all those cases, there has always been some uncondoned offence upon which the Court could and did act. In view of the opinions expressed in *Collins* v. *Collins* (1), the Queen's Proctor has thought right to bring the whole matter before the Court, with the object of obtaining an opinion as to the practice to be pursued in future. It appeared to the Attorney General and the Queen's Proctor that these were "material facts" to bring to the knowledge of the Court. There has been condonation. That condonation, in itself, involved an agreement between the petitioner and respondent, which, in their view, would be a collusive agreement and would amount to collusion. But, assuming that the Court should be in favour of the petitioner upon the point of collusion and against her on the ground of condonation, this petition must, it is submitted, be dismissed, leaving the petitioner to the relief she may be entitled to on filing a fresh or a supplemental petition.

Pickford, Q.C., in reply. *Collins* v. *Collins* (1) was a Scotch case, and does not, therefore, affect the decisions in the English Courts. Unless *Collins* v. *Collins* (1) destroys the effect of *Dent* v. *Dent* (2) and *Durant* v. *Durant* (3), these are distinct authorities for saying that the original adultery has, if condoned, been revived by the subsequent adultery. If the Court looks at anything subsequent to the decree nisi, it must look at everything which has occurred since then. The Court cannot take the decree nisi as the terminus for one purpose, and then say that the decree absolute is the terminus for another purpose. The question which the Court should consider is whether, upon all the facts, it would have granted the decree nisi.

(1) 9 App. Cas. 205. (2) 4 Sw. & Tr. 105.
(3) 1 Hagg. Ecc. 733.

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THE PRESIDENT. In the first place, I have to find what the facts in this case shew. [The President then examined the evidence, and came to the conclusion that condonation by the petitioner of her husband's adultery had been established, and also that there had been collusion between the petitioner and the respondent in concealing such condonation from the Court; and also that the respondent had subsequently committed adultery.]

That being so, the authorities seem to me to point clearly to the decisions at which I must arrive.

The whole matter is based upon the Divorce Act, 1857 (20 & 21 Vict. c. 85), and the Matrimonial Causes Act, 1860. Sect. 30 of the former Act provides that a petition is to be dismissed if the petitioner has connived at or condoned the adultery complained of, or, if the petition is presented or prosecuted in collusion with either of the respondents. Sect. 31 constitutes adultery, unreasonable delay, cruelty, desertion, and wilful neglect or misconduct conducing to the adultery of the respondent, defences, but gives the Court a discretion in regard to them. At the time the Act of 1857 was passed, the distinction between decree nisi and decree absolute did not exist. The decree dissolving a marriage was afterwards, by the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), divided into two parts; the decree nisi, or first part, being only the inchoate decree, which, at the end of a prescribed period, ripened into the decree absolute. At the same time that that provision was made, the power of intervention was, by s. 7, given to any member of the public, and was also given to the Queen's Proctor. The power given to the Queen's Proctor was divided into two parts. He might, on information being furnished to him, take such steps as the Attorney General might think necessary or expedient. This might include his shewing cause before the Court why the decree nisi should not be made absolute, in the same way as one of the public might do; or, if he suspected collusion between the parties for the purpose of obtaining a divorce contrary to the justice of the case, he might, under direction of the Attorney General and by leave of the Court, intervene and plead. It is to be observed that the section does not create any new cause for

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refusing to make the decree nisi absolute. It only provides machinery and methods by which the Court may be placed in a position to act under the provisions of s. 30 or s. 31, as the case may be, in refusing to make the decree absolute. But it is, I think, equally clear from the authorities, that events happening after as well as before the decree nisi may be made the subject of intervention, and may be brought before the Court.

The only case I think it necessary to refer to on this point, is that of *Hulse* v. *Hulse and Tavernor* (1), where it was held that the Court was bound, before making the decree absolute, to take notice of any material facts not previously brought before it, even if they had occurred after the decree nisi was pronounced. That case shews that events happening since the decree nisi may be "material facts not brought before the Court," within the meaning of the earlier part of s. 7 of the Act of 1860. It is clear that the learned judge thought that they were; and he said that, in his view, adultery committed after the decree nisi was not the less a fact not brought before the Court because, from the date of its occurrence, it was impossible that it should have been brought to the notice of the Court at the hearing of the petition; it was not before the Court at that time for the best of all possible reasons, because it had not then occurred. I am, of course, aware that in the subsequent case of *Howarth* v. *Howarth* (2) some doubt has been expressed as to whether that is a correct view.

But for the purposes of the present case, it does not appear to me to matter very much; inasmuch as it is collusion with which I have now to deal. It is clear, from the language of the latter part of s. 7 of the Act of 1860, that collusion taking place after the decree nisi may be brought before the Court by the Queen's Proctor, and is just as much a ground for refusing to make a decree absolute as it would have been for refusing a decree nisi, if it had occurred before the decree nisi was pronounced. I quite agree, that whether it is collusion or adultery or condonation that is charged, we have to see that the facts brought forward are such as establish a ground for refusing the

(1) Law Rep. 2 P. & D. 259. (2) 9 P. D. 218.

decree, upon the intervention. If, when the matter is looked into, the facts brought forward, although material, do not prove that which they are put forward to establish, there is then no ground for refusing the decree; because a mere keeping back of material facts is not, in itself, a ground for such refusal, and the decree absolute cannot be refused unless they are such as to bring the case within s. 30 or s. 31 of the Act of 1857. That is what, I think, was decided in *Alexandre* v. *Alexandre*. (1) In that case there was adultery which was condoned, and adultery which was not condoned, and the Court decided—and I think properly decided—that you must see what facts were proved at the hearing of the petition, and if you find that there remains enough on which to found a decree, even though part of the case may have been shattered by the facts subsequently brought forward, there is still sufficient ground for allowing the decree to go. The Court has always to consider whether the facts brought forward establish a case for refusing the decree. There is no difference in this respect between collusion, condonation, adultery, or other offences. In the present case it is collusion that is set up by the Queen's Proctor—that is to say, an agreement to conceal facts shewing condonation; and if that collusion is established, it is not material whether it turns out that the condonation is such as to cause the decree to be rescinded, nay, it is not material even that the facts concealed only tend to prove, and do not completely prove the condonation. The sole point, then, is, whether the facts now brought forward establish collusion.

The authority for the above view is to be found in the case of *Butler* v. *Butler*. (2) The petitioner and respondent in that case colluded together to keep back material facts from the Court, the wife agreeing not to prove adultery against her husband with more than one person, and the husband agreeing to offer no evidence against his wife. That agreement being brought to the knowledge of the Court, the jury eventually found that there had been a concealment of material facts, and that the parties had been colluding together with the object of concealing those facts. The jury, however, failed to find a

(1) Law Rep. 2 P. & D. 164. (2) 15 P. D. 66.

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verdict that the wife had committed adultery; so that the only point established was collusion to withhold material facts.

Cotton, L.J. (1), expressed his view of the matter in these words: "Here, by agreement between the parties, the matter was not fully brought before the Court, and that is collusion. It is not necessary that the petition should be presented in collusion. It is enough if it is either presented or prosecuted in collusion. It is said, however, that there is no collusion here, because the matters which were kept back from the Court were not facts which would lead to the conclusion that the wife had committed a matrimonial offence. Perhaps they would not; for the jury differed. But, in my opinion, in such a state of things it is enough if the parties have agreed together not to put before the Court material facts relevant to the issue which has to be tried."

Lopes, L.J., thus expresses his view (at p. 74): "In my opinion, an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts, which might have been adduced on the trial in evidence in support of a counter-charge against the respondent and co-respondent, amounts to collusion, even though the suppressed facts might not have been sufficient to have established the counter-charge. I believe that to be the correct definition of collusion as applicable to the circumstances of a case like this. . . ." I may, therefore, say of this case, as was said by the Court of Appeal in that one, that there has been a collusion to conceal material facts, namely, facts, in this instance, which tended to establish condonation; and the Queen's Proctor has brought forward facts which prove such collusion. Upon that point, therefore, the Queen's Proctor is entitled to succeed.

I desire, however, to say a few words on the other branch of the case.

It is argued that, even though there were no collusion, yet if there was condonation of the adultery upon which the decree nisi was pronounced, this alone ought to be a ground for refusing to make the decree absolute, even though there was subsequent adultery. The case of *Moore* v. *Moore* (2) is in point. In

(1) 15 P. D. at p. 71. (2) [1892] P. 382.

that case there was condonation followed by cruelty, both being after the decree nisi, and the learned judge (Gorell Barnes, J.) held that there was no reason why the decree should not be made absolute. He based his view upon *Dent* v. *Dent* (1), although the decision in *Collins* v. *Collins* (2) was brought before him. In the case of *Moore* v. *Moore* (3), the bona fides of the petitioner was admitted; but that seems to me to be immaterial. Whether one looks at the subsequent offence as revival of previous adultery or as cancelling the condonation, in either case the result is the same. There is strong authority for saying that subsequent misconduct revives previous misconduct. The case of *Palmer* v. *Palmer* (4) is, no doubt, not a conclusive authority; but I think that the decision in *Dent* v. *Dent* (1) is so, inasmuch as the cruelty came last; and unless the cruelty had the effect of reviving the previous adultery, it is impossible to see how the decree absolute could have been pronounced. I do not think that *Collins* v. *Collins* (2) can be considered as overruling *Dent* v. *Dent.* (1) Then, the case of *Alexandre* v. *Alexandre* (5) is an authority for saying that the Court must look at all the circumstances of the case, so that, in this case, the condonation and the subsequent adultery must be considered together. Upon the above authorities, therefore, I should hold, were it necessary, that the condonation proved in this case does not form ground for rescinding the decree.

I wish to add, that, as far as I see at present, there is no reason why the subsequent adultery of the respondent should not form a ground for a fresh petition, there being no evidence to shew that there has been any collusion with regard to that; nor would there be any collusion, as far as I am able to see, in respect to a fresh petition, if the petitioner should be advised to file one. Moreover, I see no evidence of connivance on the part of the petitioner in regard to the fresh adultery. I make an order rescinding the decree nisi, and I dismiss the petition.

(1) 4 Sw. & Tr. 105.
(2) 9 App. Cas. 205.
(3) [1892] P. 382.
(4) 2 Sw. & Tr. 61.
(5) Law Rep. 2 P. & D. 164.

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Inderwick, Q.C., said he had been instructed to ask for costs; but he was content to leave the matter in the hands of the Court.

THE PRESIDENT. The Queen's Proctor brings cases like this before the Court upon public grounds, and I think that, unless some moral fault on the part of a petitioner is established, the order rescinding the decree may well be made, without costs. In this case, therefore, I make no order as to the costs of the intervention.

Solicitor for the petitioner: *Walter H. Cowl.*
The Queen's Proctor.

[Reported by H. DURLEY GRAZEBROOK, Esq.]

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March 5.

POLLARD *v.* POLLARD.

Divorce—Variation of Settlements—Wife's Power of Appointment upon Second Marriage—22 & 23 Vict. c. 61, s. 5.

Where a marriage settlement gives the wife, upon the death of the husband, a power of appointment in favour of a second husband and the children of a second marriage, the Court will not, upon the dissolution of the marriage through the misconduct of the husband, vary the settlement so as to enable the wife to exercise such power of appointment before his death.

MOTION to confirm the report of the registrar on the application of the petitioner for the variation of the settlement made upon the marriage, which had been dissolved on the ground of the respondent's adultery and cruelty. The petitioner had married again. The fund, the present income of which amounted to about 933*l.*, was settled on her for life for her separate use without power of anticipation, with remainder to the respondent for life, with remainder, subject to the exercise of powers of appointment, to the children of the marriage who should attain the age of twenty-one or, being daughters, should marry under that age, in equal shares. The deed provided that, should the respondent marry again, he was to be entitled to only half the income, and, should he become bankrupt, his interest was to cease; and that, if the petitioner should survive the respondent and marry again, she should have power to appoint half the fund

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to the children of the second marriage and half the income to her second husband. The respondent had brought into settlement only a policy of life insurance for 1000*l.* The deed contained a power to raise 4000*l.* out of the wife's trust estate, to be secured by another life policy for his benefit, and this sum had been raised; but both policies had been allowed to lapse owing to non-payment of the premiums. He had been adjudicated a bankrupt, and had not obtained his discharge. There were five infant children of the first marriage, of whom the petitioner had the custody.

The registrar recommended the extinction of the beneficial interest of the respondent and of his powers of consent or otherwise under the settlement, and that the petitioner's costs in the divorce suit should be paid out of the fund; but did not recommend that she should be enabled to exercise the power of appointment in favour of her second husband and the children of her second marriage, as though the respondent were dead.

J. T. Prior, for the petitioner and the trustees of the settlement, contended that the wife's power of appointment ought to be accelerated. He suggested as limitations, either that there should be no power to appoint to any child of the second marriage, unless on attaining the age of twenty-one or, if a daughter, marrying before that age; or that no child of the second marriage should take more than he or she would be entitled to, if the whole fund were equally divided between the children of both marriages, who should attain the age of twenty-one or, being daughters, should marry before that age.

E. Macnaghten, for the guardian ad litem of the children of the marriage, contended that the Court had no power to vary the settlement to the prejudice of these children, who, as matters stood, would be entitled to the whole of the trust fund after the death of the petitioner.

[He cited *Crisp* v. *Crisp* (1), *Noel* v. *Noel* (2), and *Forsyth* v. *Forsyth*. (3)]

(1) Law Rep. 2 P. & D. 426. (2) 10 P. D. 179.
(3) [1891] P. 363.

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[*Inderwick, Q.C.*, as amicus curiæ, stated that he had recently carefully considered the matter, and could find no precedent for the proposed variation.]

THE PRESIDENT. It is contended that, where a marriage settlement gives the wife, upon the death of the husband, a power of appointment in favour of a second husband and the children of a second marriage, the Court, upon the dissolution of the marriage owing to the misconduct of the husband, ought to vary the settlement by enabling the wife to exercise this power before his death. Such a contention does not seem altogether unreasonable; but the fact remains that, though provisions of this kind are common in marriage settlements, no record appears to exist of such a variation ever having been sanctioned. I cannot undertake to mould the settlement anew. The limitations which have been suggested involve speculations upon which it is impossible for me to enter. The wisest course is to leave undisturbed the provision of the settlement under which the wife has power to re-settle only upon the death of her first husband, though it is through his misconduct that the marriage has been dissolved.

Solicitors: *Norton, Rose, Norton & Co.; Hargrove & Co.*

H. D. W

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Jan. 15, 20, 22, 23.

Admiralty—Sale of Ship by Mortgagee—Purchaser with Notice of Employment of Ship—Certificate of Registry—Order for Delivery—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 50.

A shipowner, whilst a steamer was being built for him, entered into an agreement with the defendants by which he undertook to fit her for a particular trade and run her for five years as one of the defendants' line.

After the completion and registration of the vessel her owner mortgaged her. Subsequently the plaintiff became second mortgagee, and, after the vessel had been running upwards of two years in the defendants' line and was temporarily laid up, her owner died, having made default in payment of instalments under the first mortgage.

The first mortgagees, who were without notice of the agreement with the defendants, thereupon took possession of the vessel and sold her to the plaintiff, who, at the date of his second mortgage, had notice of the existence of the agreement, and, at the date of his purchase, notice of the contents.

The plaintiff having entered into a contract for the sale of the ship to third parties, claimed, for purposes of navigation, under s. 50 of the Merchant Shipping Act, 1854, the delivery up of the certificate of registry which was in the hands of the defendants. The defendants denied the plaintiff's right to the certificate except on condition that the plaintiff should be restrained from dealing with the ship in derogation of the agreement:—

Held, by Gorell Barnes, J., that the plaintiff was entitled to an order for the delivery up of the certificate, and that he was not bound by the agreement between the late owner and the defendants, for otherwise the power of sale of the first mortgagees as vendors would be restricted.

Motion by plaintiff, the sole registered owner of the steamship *Celtic King*, for an order upon the defendants, the Tyser Line, Limited, to deliver up the certificate of registry of that steamship.

The material facts were:—

On August 19, 1889, an agreement was entered into between William Ross; trading as William Ross & Co., and W. H. Tyser, a member of the firm of Tyser & Co. It recited that W. H. Tyser was about to form, and he or his firm were to have the management of, a company to be called "The Tyser Line, Limited," for the purpose of establishing a line of steamships to be engaged in the Australian shipping business, and Ross & Co. were to provide at least two steamers, then in course of building for them, of the size and class mentioned, to be run

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by the company as part of their line on the following (amongst other) conditions:—

"1. Ross & Co. shall at their own expense in all respects cause and procure both the said steamers to be duly completed ready for sea and fitted with refrigerating machinery and insulating chambers which shall not be removed from the vessels during the currency of this agreement (except by mutual consent approved by the company) and capable of carrying about 900 to 1000 tons weight of frozen meat each and Ross & Co. shall use their best endeavours to have such steamers on the berth in London so fitted and ready for loading in the case of the first of the said steamers by November 1, 1889, and in the case of the second of the said steamers by April 1, 1890, but Ross & Co. shall have the right to substitute other steamers for those specified herein of about equal size and power."

"2. Ross & Co. shall during the continuance of this agreement keep and maintain each of the said steamers tight staunch strong and properly manned equipped provisioned and in every way fitted for the performance of the voyages in which the company may require to run the same and eligible for the conveyance of Government stores as also provided with such extra or duplicate parts of the refrigerating machinery as are reasonably necessary and usually provided for a New Zealand voyage with frozen meat as also with all such engineers for working the refrigerating machinery as are or may for the time being and from time to time be required by the terms of the bills of lading ordinarily in use for the conveyance of frozen meat a copy of which is affixed hereto and Ross & Co. shall at all times comply with observe and carry out the terms of such bills of lading and maintain the said steamers and refrigerating machinery and insulation so that the same shall at all times be a first class insurable risk at Lloyd's for frozen meat and other cargo."

"3. The said steamers shall be run and worked by the company and for that purpose shall as regards the employment thereof be under the control and direction of the company who shall have all such powers and discretions as a charterer of the

said steamers would have if the same had on time charter been chartered to the company for the purposes and for the voyages in which the company may from time to time be proposing or intending to employ the same, but nevertheless nothing herein contained shall be deemed to constitute the company charterers of the said steamers or as incurring any liabilities as such but on the contrary the position shall be that the steamers are being worked on account and at the cost and risk in all respects of Ross & Co. as owners, the same as if on the occasion of each voyage the vessel was laid on the berth for loading on owner's account the company occupying the position of loading Brokers or Agents with the additional control as herein specially mentioned and provided for but it is agreed that nothing in this clause shall enable the company to interfere with the rights reserved by Ross & Co. in the agreement (1) given of even date between themselves and Tyser & Co."

"4. The company shall use their best endeavours to secure profitable employment for the vessels, and for that purpose shall have the power to charter the said vessels or parts thereof on any terms or for any period within the limits of this agreement to any person or persons or company $\frac{\text{and}}{\text{or}}$ from time to time to make such arrangements with any persons firms or companies in respect of the loading of the said vessels either outwards or homewards, or both or for pooling the earnings from the said steamers with others including if thought desirable as part of any such pooling arrangements entering into joint account purchases of meat to be carried."

"6. The company $\frac{\text{and}}{\text{or}}$ their agents shall on behalf of Ross & Co. have the appointment of the agents and stevedores at all ports with power to make all the necessary arrangements and to select such loading or discharging docks or berths as in their opinion shall be reasonable safe convenient or necessary and the vessel shall be consigned in London to the company both for outward and inward business and at all foreign ports to such agents as the company shall from time to time determine and the charges of such agents and the stevedores' bills with any other payments that the company may make on behalf of Ross

(1) The terms of this agreement were not material.

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& Co. may be retained by the company out of any freight or other monies received by them on behalf of the vessels. In the event of freight being payable abroad Ross & Co. shall pay the agents 2½ per cent. commission for collecting the amounts at each port and the agency fees for the ship's ordinary business shall be limited to an average of ten guineas for each port in addition."

"7. Ross & Co. will in the appointments of the captains chief engineers and officers of the said vessels meet the reasonable wishes of the company and on any reasonable objection by the company or their London agents, when the vessel is in a home port, Ross & Co. shall remove any captain chief engineer or officer of whom the company disapprove."

(Clause 10 dealt with the commission to be paid by Ross & Co. to the company on the gross earnings of each of the said steamers, as also a sum for each all-round voyage from the United Kingdom or Continent of Europe to Australia $\frac{\text{and}}{\text{or}}$ New Zealand and back per ton of frozen meat space for which each steamship was for the time being insulated.)

"11. This agreement shall continue in force as regards each of the said steamers for five years from the date when they respectively start on their first voyages hereunder and thereafter during such time as Ross & Co. shall desire to continue the said steamers or either of them in the Australasian trade and the company shall be willing to continue to work and employ the said steamers or either of them under the terms of this agreement . . . ."

"12. This agreement shall continue in force notwithstanding any changes in the firm of Ross & Co. whether arising from death or otherwise of the said William Ross and shall be binding on his executors or administrators as also as regards each of the vessels the subject hereof upon the owners of such vessels for the time being the same as if this agreement was a charter of such vessels . . . ."

On September 10, 1889, the defendant company, which had been in the meantime formed, adopted the agreement of August 19 as binding between William Ross and the defendant company.

In December, 1890, negotiations were entered into by William

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Ross with the Marine Securities Corporation, Limited, for the mortgage of the *Celtic King* to secure a sum of 30,000*l*.

On January 3, 1891, the vessel, which had been in the meantime completed, was registered as a British screw steamer of 2428 tons, owned by William Ross, who was also described as manager-owner. On January 5 the mortgage by William Ross to the Marine Securities Corporation, Limited, was executed without the mortgagees having any notice of the contracts of 1889 with the defendant company, and on January 6 this mortgage was registered.

On November 30, 1892, a second mortgage on the *Celtic King* was made by William Ross to his brother Frank Ross of Quebec, the plaintiff in the action, and on December 1 this mortgage was registered and stated to be to secure an account current.

The vessel was employed in the Tyser Line from shortly after her completion until October 6, 1893, when she arrived in the port of London, where she has since been lying up, the master, officers, and crew having been paid off, and the certificate of registry then came into the possession of the defendant company. There were no subsisting agreements for the carriage of goods out or home specifically relating to this ship; but as she formed one of the six vessels running in the line, and the defendant company had general agreements as to cargoes, the defendants looked to carry out those engagements partly by the use of this ship as one of the line.

On October 17 William Ross died, and his estate is being administered in the Chancery Division of the High Court in an action instituted by the plaintiff Frank Ross as one of the largest creditors, the defendant being that one of the executors who had proved the will.

On October 24, as there were instalments in default, the Marine Securities Corporation took possession of the *Celtic King*, then in the Victoria Docks, and negotiations were entered into with the defendant company by the plaintiff Frank Ross with a view to the future employment of the ship on more favourable terms to the owner than those contained in the agreements; but these negotiations did not result in any definite arrangement.

On November 4 the defendants gave the first mortgagees, the

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Marine Securities Corporation, formal notice of the existence of the agreements between themselves and William Ross prior to the mortgage; but on November 6 the first mortgagees by letter disclaimed all knowledge of the terms of the agreement, and denied that their rights were in any way affected thereby. On November 16 the first mortgagees gave the receiver and manager of William Ross's estate notice that default had been made in providing funds to meet acceptances to the amount of 2875*l.*, and on November 27 and December 1 wrote that they proposed to sell to the plaintiff Frank Ross the steamer *European* and freight for 6500*l.*, and the *Celtic King* and the *Norse King* for 56,000*l.*, there being arrears at that time on the *Celtic King* amounting to 23,875*l.* On December 6 the bill of sale of the *Celtic King* by the first mortgagees to the plaintiff Frank Ross was registered as of that date, and on the same day, as the result of two agreements of that date with respect to this ship and the two others, the plaintiff Frank Ross re-mortgaged the *Celtic King* to the Marine Securities Corporation to secure so far as this ship was concerned the sum of 22,000*l.*, and a cash payment was made of 7393*l.* 11*s.* 10*d.*, a sum of 16,000 being taken by Frank Ross towards paying off his second mortgage, the net result being that the plaintiff Frank Ross became and has since remained sole registered owner of the *Celtic King* and manager thereof, with the registered mortgage upon her by him to the Marine Securities Corporation, which has since been paid off to the extent of leaving only 750*l.* still due.

On December 20 the plaintiff entered into a contract for the sale of the *Celtic King* to Allport & Hughes, who had notice of the agreements with the Tyser Line. The possession of the certificate of registry now became necessary to enable the plaintiff to have his ownership recorded thereon in pursuance of the Merchant Shipping Act, and also for the purpose of handing it to his purchasers on completion.

On January 4, 1894, an information was laid at the Mansion House Police Court under the Merchant Shipping Act, 1854, s. 50 (1), on behalf of the plaintiff Frank Ross as registered

(1) 17 & 18 Vict. c. 104, s. 50: "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to

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owner of the *Celtic King*, for a summons against the defendant company to answer a charge of unlawfully detaining the certificate of registry of that vessel from him, as the person entitled to its custody for the purposes of navigation of the vessel; but on January 10, the agreements with the Tyser Line having been read, the summons was dismissed by the presiding alderman on the ground that reasonable cause had been shewn by the defendants for their refusal to deliver up the certificate. The present action in the Admiralty Division of the High Court was thereupon instituted, and, by special leave, the notice of motion was served with the writ of summons in the action, by which, in addition to the delivery up of the certificate, and an injunction against its further detention, a claim was made for damages for the detention of the certificate, and that the plaintiff might be quieted in possession of the steamship.

By consent, the motion was treated as the trial of the action without pleadings, the defendants suggesting by way of defence and counter-claim that, in the circumstances, they ought not to be called upon to deliver up the certificate, and that, if it were delivered up, an injunction ought to issue against the plaintiff and his agents restraining him and them from sailing or permitting the sailing of the ship contrary to the provisions of the agreements between the defendants and William Ross, the former owner of the ship. To such a suggested counter-claim the plaintiff undertook to appear, so as to raise the real question between the parties, viz., whether or not the vessel was still

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detention by reason of any title, lien, charge, or interest whatsoever, which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate; and if any person whatever, whether interested or not in the ship, refuses on request to deliver up such certificate when in his possession or under his control to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation as aforesaid, or to any registrar, officer of the Customs, or other person legally entitled to require such delivery, it shall be lawful for any justice, by warrant under his hand and seal, or for any Court capable of taking cognizance of such matter, to cause the person so refusing to appear before him and to be examined touching such refusal; and unless it is proved to the satisfaction of such justice or Court that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding one hundred pounds. . . ."

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bound by the agreements made with the defendants by her former owner, in which case the plaintiff would not be entitled to the certificate without seeing that that arrangement was carried out, and the following letter, dated January 17, 1894, was written by the plaintiff's solicitors to the defendants' solicitors, admitting, for the purposes of the action, "that the plaintiff was, prior to the mortgage to him, aware that the vessel was being loaded by the defendants, and employed in their line under the agreements between them and William Ross, and . . . . that the plaintiff, although he did not know the terms of the agreements, had inferred that they were onerous"; also, "that the plaintiff, at the time of the sale to him, on December 6, 1893, had become aware of the contents of the agreements."

Sir Walter Phillimore, and *Lauriston Batten*, for the plaintiff. The Admiralty Division, as the successor of the High Court of Admiralty, has jurisdiction to make an order for the delivery up of the certificate of registry to the plaintiff if unlawfully detained by the defendants, and the application may be made by motion: *The St. Olaf* (1), where *The Frances* (2) is referred to; see also *The Barbara.* (3) This may be done to complete a sale: *Gibson* v. *Ingo* (4); and the defendants cannot retain the certificate as a security against the vessel sailing: *Wiley* v. *Crawford.* (5)

Secondly, the plaintiff is the person entitled to the possession of the certificate, for, on the death of the mortgagor William Ross, in default as regards instalments due, the Marine Securities Corporation, as first mortgagees, were justified in exercising their power of sale under s. 71 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and they properly sold to the plaintiff free from incumbrance, for the first mortgagees had no notice of the agreement with the defendants; and if the notice, with which the plaintiff as second mortgagee and as purchaser, is fixed, is to be a bar, then the power of sale of the first mortgagees would be clogged: see *Lowther* v. *Carlton* (6), and the cases collected in the notes to *Le Neve* v. *Le Neve*, in White and Tudor's Leading

(1) 2 P. D. 113.
(2) 2 Dods. 420.
(3) 4 C. Rob. 2.
(4) 6 Hare, 112.
(5) 29 L. J. (Q.B.) 244; 30 L. J. (Q.B.) (Ex. Ch.) 319.
(6) 2 Atk. 242.

Cases in Equity. (1) The plaintiff, as purchaser from the first mortgagees, is properly entitled to sell to Allport & Hughes, and he is seriously prejudiced by the detention of the certificate, as he cannot complete his own title as purchaser under s. 45 of the Merchant Shipping Act, 1854, or complete the sale to Allport & Hughes. It must also be produced on signing articles, as well as for the purpose of clearing the ship; and generally its use is now required by the master for the lawful navigation of the vessel under s. 50 of the same Act. It is possible that the defendants may have a claim against the estate of the late William Ross for breach of contract; but that will not justify them in withholding this certificate from the plaintiff, who, as sole registered owner, is primâ facie entitled to it. In any event, the defendants cannot be entitled to retain it, even under the agreements which they set up, as, by paragraph 3, their position is that of loading brokers or agents for a principal, and that principal is, as matters now stand, the plaintiff.

Finally, if there is any ground for the injunction to restrain the sailing of the ship in breach of the agreement, it is asked for against the wrong party, as the plaintiff is selling the ship, not sailing her. His purchasers, Allport & Hughes, are buying with full notice of the agreements, and the plaintiff has therefore committed no breach.

Bigham, Q.C., and *J. A. Hamilton*, for the defendants. This vessel has been running in the defendants' line ever since she was built, and the defendants are, and have always been, ready and willing to perform their part of the agreements made with the late owner, under which she was specially fitted by him at considerable cost, for a particular kind of cargo, in a particular trade; and practically she is not adapted to any other. In order to carry out those agreements the certificate of registry has always been left with the full knowledge and approval of her owner in the hands of the defendants, on the conclusion of each homeward voyage, until it was again required by the master prior to leaving for sea on the next outward voyage.

These circumstances coming to the knowledge of the police magistrate, he declined to interfere, as there was reasonable

(1) 6th ed. vol. ii. p. 43.

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cause for the refusal to deliver up the certificate within the meaning of s. 50 of the Merchant Shipping Act, 1854: *Arkle* v. *Henzell.* (1) This Court will take the same view, for that section of the Act is only aimed at any impediment to the lawful navigation of the ship; and the defendants have always been willing to permit the certificate to be used for that purpose, and have also been willing to allow the certificate to be produced, under s. 45 of the same Act, to the registrar for the purpose of completing the title of the owner.

The plaintiff is, however, seeking to obtain possession of the certificate for another purpose altogether, viz., to enable him to deal with the vessel in breach of the agreements with the defendants, and hand the vessel over to a ring formed in opposition to them, though these agreements are binding notwithstanding any changes in the firm of Ross & Co., or any change in the ownership of the vessel, and were made prior to the title of the plantiff's vendors accruing under their mortgage.

It is not necessary that the Marine Securities Corporation, as first mortgagees, should have had notice of these agreements, for where a mortgagee leaves the mortgagor in possession he impliedly authorizes the mortgagor to enter into contracts for the reasonable and beneficial employment of the vessel; and not only the mortgagee, but a purchaser from him, will be restrained by the Court from interfering with the execution of those contracts: *Collins* v. *Lamport.* (2) See also *De Mattos* v. *Gibson.* (3)

Assuming, however, that the first mortgagees could sell free from incumbrance, that will not help the plaintiff, as he admittedly had notice of the existence of the agreements at the time of taking his second mortgage, and notice of their contents at the time of his purchase from the first mortgagees.

To allow the plaintiff to shelter himself under the title of the first mortgagees would be to assist him by a stratagem, such as was contemplated in *Willoughby* v. *Willoughby* (4), to defeat the equity of the defendants, of which he had notice. This will not be permitted, for in the words of Fisher on Mortgages, with

(1) 8 E. & B. 828.
(2) 34 L. J. (Ch.) 196.
(3) 4 De G. & J. 276.
(4) 1 T. R. 763.

reference to transactions of this sort, "notice makes him come fraudulently." (1)

The plaintiff can buy and get a clear title, but subject to the existing engagements of the ship (see the observations of Butt, J., in *The Vindobala* (2)); and the onus is upon those alleging that the contract is not remunerative: *The Fanchon.* (3)

The equity cases relied on by the plaintiff are not in point, as they were before the passing of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63, s. 3), when the doctrine of notice had no operation with reference to British ships duly registered: see *McCalmont* v. *Rankin* (4); *Liverpool Borough Bank* v. *Turner* (5); *Stapleton* v. *Haymen* (6); and the cases cited in the notes to *Cuddee* v. *Rutter*, in White and Tudor's Leading Cases in Equity. (7)

[The following cases were also referred to: *Hiles* v. *Moore* (8); *Splidt* v. *Holmes* (9); *Tulk* v. *Moxhay* (10); *The Horlock.* (11)]

Sir Walter Phillimore, in reply. (12) Assuming that a mortgagee leaving the mortgagor in possession will be presumed to know that the vessel will be chartered or otherwise placed in the hands of third parties for longer or shorter periods, that will not fix the mortgagee with notice of such an unusual engagement of the vessel for five years under an unregistered agreement, made before the vessel was registered or even finished building, and involving onerous conditions of a partnership character, such as buying meat on joint account. An agreement of this nature, if binding, would, of necessity, impair the security and prevent the mortgagee from selling to advantage. The

(1) 3rd ed. p. 612, § 1007; 4th ed. p. 569, § 947.
(2) 13 P. D. 42; 14 P. D. 50.
(3) 5 P. D. 173.
(4) 2 D. M. & G. 403.
(5) 2 D. F. & J. 502.
(6) 12 W. R. (Ex.) 317.
(7) 6th ed. vol. i. pp. 930, 931.
(8) 15 Beav. 175, at p. 181.
(9) 10 East, 279.
(10) 2 Phil. 774.
(11) 2 P. D. 243.

(12) *T. E. Scrutton*, for Allport & Hughes, applied, under Order XVI., r. 2, for leave to intervene on the ground that, as they were the alleged purchasers from the plaintiff, they were parties affected by the decision; but on objection by the defendants, that Allport & Hughes could only come in as defendants to their counter-claim, and could not be made such without the consent of the defendants, leave was refused.

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principle involved in the case of *Collins* v. *Lamport* (1) will therefore not apply here. The case of *De Mattos* v. *Gibson* (2) has been criticized, and would only be followed with extreme caution (see remarks of Kay, L.J., in *Whitwood* v. *Hardman* (3)), the concluding portion of the judgment is also in favour of the plaintiff's contention.

GORELL BARNES, J. [After dealing with the facts of the case, and finding, on the evidence, that the transaction, between the Marine Securities Corporation as first mortgagees and vendors and the plaintiff as purchaser, was bonâ fide, the learned judge proceeded:—]

Now the plaintiff asks for the certificate, and says that he is entitled to it independently of any question raised as to the rights of the parties to the user of the ship, and he relies upon the 50th section of the Merchant Shipping Act, 1854. [The learned judge read the section already set out, and continued:—]

I think that the plaintiff's contention upon this part of the case is correct, both having regard to the terms of the Act, and to the decision in *Gibson* v. *Ingo* (4), and I think, therefore, he is entitled to succeed in obtaining an order against the defendants for the delivery up of the certificate, as it is asked for in order that it may be handed by the plaintiff to those about to navigate the ship.

The question between the parties is what navigation she ought to be engaged in, and the delivery up of the certificate is not in one sense the real point, though, as a matter of form, it ought to be handed over to those entitled to it, and I think that must be my order so far as the certificate is concerned.

The defendants, however, contend that it ought not to be handed over because of this dispute as to how the ship is to be employed. I do not think that is the proper way to look at the case, because I think the certificate ought to be handed over, and that the proper form, if the defendants can maintain it, of their application, is for an injunction to restrain the plaintiff from dealing with the ship (putting it shortly) in

(1) 34 L. J. (Ch.) 196.
(2) 4 De G. & J. 276.
(3) [1891] 2 Ch. 416, at p. 431.
(4) 6 Hare, 112.

derogation of the agreements, so that the real contention in this case may be raised.

Before actually dealing with that it is necessary to point out that the parties before me are only the plaintiff Mr. Frank Ross and the defendants the Tyser Line, Limited. The purchasers of the ship, Messrs. Allport & Hughes (the purchasers in the sense that they have made their contract though they have not yet had their transfer) ask to be made parties with a view of determining their rights against both the plaintiff and the defendants, and the plaintiff at any rate is willing that this should be done; but the defendants refuse to accede to that suggestion, and only wish the matter decided between them and Mr. Frank Ross. After that refusal on their part, I do not feel that I could make an order that they should have some one as defendant to their counter-claim whom they do not wish to have, though I should have thought as a matter of business it would have been advisable that the rights of all parties should have been determined once and for all.

However, what I have now to consider is the defendants' application for an injunction against the plaintiff.

The defendants take two points upon that: first, that the mortgagee is bound by the contract made before his mortgage, although he had no notice of the contract. Little or no authority has been cited for that general proposition, and I do not think it is necessary in this case to express with any precision what is the general rule upon that point, because there may be cases in which, although there is no actual notice, a mortgagee ought to assume that the ship is engaged in some ordinary employment, and without further consideration I should not like to express myself too positively upon that point. The facts here are, however, very different from the case of the ordinary employment of a vessel under ordinary loading terms or under an ordinary charter.

The mortgagees took their mortgage almost immediately the ship was registered, and, under those circumstances, I do not see how they could assume or be bound to assume that there was a contract of this particular character existing, which affected the ship for the next five years, and in fact they knew nothing

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whatever about it. I do not think, having regard to the dates and facts, that the first mortgagees when they took their mortgage would be bound by the terms of this particular contract—bound in the sense, I mean, that they could not sell the ship free of it if they chose to enforce their security.

On this part of the case there is a further point which it is important to bear in mind. It is said upon the defendants' side that the contract would not have any depreciatory effect upon the security of the mortgagee. I cannot take that view. It seems to me that where there is a contract of this particular character it would be prejudicial to the security if the mortgagee were to be obliged to admit, or forced to admit, that he could not sell the ship to realize his security in an open market without that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time as things are good and as things are bad; but it is a contract which binds the vessel for a very long period, and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were tied by its terms.

One or two of those terms have been called attention to, as, for instance, the purchasing of meat on joint account, and it seems to follow that if this vessel were put up for sale without being free from this arrangement, that the mortgagees would not be able to adequately realize their security upon default. I think, therefore, that, with regard to this proposition, the first mortgagees were in this case entitled to realize their security upon the default of their mortgagor by selling her without being hampered by the engagements made under the contracts with the Tyser Line.

But counsel for the defendants say that that is not so with regard to this particular purchaser, because, as stated in the letter of the solicitors, he took his mortgage with notice of the position of the ship, and of course had full notice of the agreements before he completed the purchase, and therefore he ought not to be allowed to deal with the ship in any way in derogation of the agreements.

But there again decisions in equity cases have been cited to

me which shew that a purchaser with notice is entitled to rely upon the title of his vendor without notice, because otherwise that vendor would be restricted in his powers of sale. That is exactly the position in which these mortgagees would be if they could not sell, free of the agreements, to a person in the position of Mr. Frank Ross; for if Mr. Frank Ross were at an auction and bid the highest price for the ship, or offered higher than any one else—because he happened to want her—he could not, if the defendants are right, buy her at that offer, free from the agreements, because he would have notice of the terms upon which the ship was previously engaged.

Two other points are taken as an answer to the application for an injunction: the first is that there is really nothing to restrain the plaintiff from, because the case is in one respect analogous to that in *De Mattos* v. *Gibson* (1), where the position of the mortgagor was such that practically the contract between him and the charterer was at an end, and where, in the concluding part of the decision, it was held (2) that the mortgagee would not be restrained from availing himself of any rights which his possession of the vessel and his title as mortgagee would have enabled him to exercise.

This case seems to me in one sense very near to that, because of the position in which the death of Mr. William Ross has placed his estate, though that point has not been dealt with to the extent of shewing what the executor proposes to do or proposed to do about these vessels, except that I cannot help thinking that he does not intend to go on with them. I should not, however, like to dispose of this case merely upon that particular point.

The next point taken was, that the motion really ought to be against Messrs. Allport & Hughes, and that, as they had notice of the agreements, Mr. Frank Ross has done all that he need do, for if he is entitled to sell the ship, and if he sells her to a person who has taken her with notice of the contract, he has not done anything now to defeat, or in derogation of, the agreements.

I think there is a good deal in that point, and I cannot help

(1) 4 De G. & J. 276. (2) 4 De G. & J. at p. 301.

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thinking as a matter of business the defendants were not wise in not disposing of that matter once and for all; but, after all, that is putting the case on a somewhat narrow ground, and although I think that that contention may be correct, still, having regard to the case of *Collins* v. *Lamport* (1), I prefer to put it upon the broader ground, namely, that I do not think, in the circumstances of this particular case, the mortgagees were disentitled to sell the vessel free of these engagements, and I think that Mr. Frank Ross was entitled to take up the position which they themselves had.

As this matter is one of urgency and of importance to both sides, I have endeavoured at once to put my judgment into such a shape as shall clearly express the views I hold; and although I can see quite well that the defendants may feel that it is a serious hardship upon them, having made this contract and not being able strictly to insist upon it, still they have their remedy, if it is broken, against the estate of Mr. William Ross; and I think that while, on the one hand, it is important that persons should be able to charter vessels in the ordinary way without interference by mortgagees other than so far as is necessary to protect the security, yet, on the other hand, a mortgagee without notice of any particular contract affecting a ship in this way ought not to be prevented from realizing the security, and it seems to me that the contention of the defendants would very much fetter that right by affixing to it a contract of this character.

The conclusion, therefore, to which I have come is, that the plaintiff must have an order in his favour for delivery up of the certificate, the injunction asked for by the defendants will be refused, and the plaintiff must have the costs of the action, with, if necessary, an inquiry as to damages.

Solicitors for plaintiff: *Waltons, Johnson, Bubb, & Whatton.*
Solicitors for defendants: *Clarke, Rawlins & Co.*

(1) 34 L. J. (Ch.) 196.

T. L. M.

FFINCH AND ANOTHER *v.* COMBE AND OTHERS. 1894

Jan. 20, 21; *Feb.* 1, 16; *March* 12.

Probate — Will — Obliteration — Words of Will before Alteration whether "Apparent"—Evidence of Experts in Writing of what nature admissible— Wills Act (1 *Vict. c.* 26), *ss.* 20, 21.

By s. 21 of the Wills Act (1 Vict. c. 26), "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will."

Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the section, if experts using magnifying glasses, when necessary, can decipher them and satisfy the Court that they have done so; but it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it.

Slips of paper which could have been removed, leaving the document intact, were, after the execution of a will, pasted over certain words in it. These words could be read by an expert in writing, on placing a piece of brown paper round them, and holding the document against a window pane:—

Held, that such concealment amounted to an "obliteration" of the words, but that as they could be read by an expert in writing using the above means, they were "apparent" within the meaning of the section.

ACTION to obtain probate of the will of George Fahie Horsford, as including certain words in the will, which had been omitted in the probate of such will and a codicil granted by Sir J. Hannen in 1874. (1) Strips of paper had been pasted over the words in question, as it was assumed, after the execution of the will. The defence was, in substance, that the concealed words were not "apparent" within the meaning of s. 21 of the Wills Act. (2)

(1) See *In the Goods of Horsford* (Law Rep. 3 P. & D. 211).

(2) The Wills Act (1 Vict. c. 26), s. 20: "And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Sect. 21: "And be it further enacted, that no obliteration, interlineation or other alteration made in any will after the execution thereof shall

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The will and codicil (1) were submitted by the Court to an expert in writing, Mr. S. R. Scargill-Bird, the Assistant Keeper of Public Records, with the following instructions :—

"The subject on which information is desired is whether, and,

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be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

(1) The following is a copy of the material parts of the will and codicil :—

First page: "I leave and bequeath to my adopted godchild Rosina Horsford Wood, for her sole use during her lifetime, the interest of whatever sum of money may be in my name in the New Three per Cents. of the Bank of England at the time of my decease, and, should the said Rosina Horsford Wood marry and have children, the principal to them after her death, but in case the said Rosina Horsford Wood dies single, or, if married, childless, the interest of the said sum will then revert to my brother Sir Robert Marsh Horsford K.C.B. for his lifetime, and afterwards the interest to my cousin Amelia Thorp, wife of Colonel Thorp formerly of the 89th Regiment." [First piece of paper containing no words.]

Second page: "I also leave and bequeath to my adopted godchild Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of Three hundred and nine pounds nine shillings and sixpence sterling, being Bank stock in my name, deducting from the interest of that amount an annuity of five pounds, which I leave and bequeath to Georgina Amelia Horsford of the Island of Antigua W. I. until her death, when it will then revert to the said Rosina Horsford Wood, and, should the said Rosina Horsford Wood marry and leave children, the principal (or said Bank stock) to them after her decease, but in case the said Rosina Horsford Wood dies single, or, if married, childless, the interest of the said Bank stock will revert to my brother Sir Robert Marsh Horsford K.C.B. for his lifetime, and afterwards the interest to my cousin Amelia Thorp, widow of Colonel Thorp formerly of the 89th Regiment and after her death the principal or . . ."

Third page. "Said Bank stock" [Second piece of paper containing the words "To Mary Ffinch the eldest daughter of John Ffinch of Greenwich Esq. deceased."] "I also leave and bequeath to my adopted godchild Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of one hundred and seventy-four pounds two shillings and threepence sterling in my name in the Reduced Three per Cent. Annuities of the Bank of England, and should the said Rosina Horsford Wood marry, and have children, the principal to them after her decease, but in case the said Rosina Horsford Wood dies single, or, if married, childless, the interest of the said amount will then revert to my

if so, under what circumstances, any and what part of the writing underneath four slips of paper pasted or gummed on four portions of a will can be read.

"Such portions are (1.) a passage at the bottom of page 1, (2.) a passage at the top of page 3, (3.) a passage at the bottom of page 3, (4.) a passage at the top of page 4.

"The remainder of the will and a codicil may be read by Mr. Bird, but it is desired that no information should, before the reading of the concealed passages is attempted, be obtained of the words supposed to be concealed. A sufficient time necessary for making the fullest attempt to read the words in question may be taken.

"On no account must chemicals, water, or anything of the kind be used on the document, nor must the slips pasted on be removed, or the document itself affected in any way."

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brother Sir Robert Marsh Horsford K.C.B. for his lifetime, and afterwards the interest to my cousin Amelia Thorp, widow of Colonel Thorp formerly of the 89th Regiment." [Third piece of paper containing the words "and after her death the principal to Mary Graham daughter of the Rev. Leonard Graham who married Lavinia Horsford."]

Fourth page. [Fourth piece of paper containing no words.] "I also leave and bequeath to my adopted godchild Rosina Horsford Wood, the sum of thirty-one pounds one shilling and threepence sterling in my name in the Consolidated Three per Cents. of the Bank of England to be made use of by her in whatever way she may think fit. I also leave and bequeath to my adopted godchild Rosina Horsford Wood, whatever sum of money may be found in my leather portmanteau or elsewhere after my decease not otherwise disposed of. . . ."

Codicil. "Should anything occur to prevent from death my will acting in the way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-in-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my Bank stock, for her sole use. I leave and bequeath [piece of paper containing the word "ten"] pounds [piece of paper containing the words "which will be found"] with my photograph to Emily Bush the youngest daughter of Lieut.-Colonel J. T. Bush, late of the H.E.I.C. Service Bengal Army, as a remembrance for kindly coming to see me when she was a little girl."

Sir J. Hannen directed that the pieces of paper attached to the codicil should be removed. The concealed words were "nineteen" and "nineteen shillings."

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"The specific questions to which answers are desired are the following:

"What if anything can be read under circumstances of good daylight and aspect?

"1. When the document is simply held up in the air against the light.

"2. When the document is put against a pane of the window.

"3. When a frame of brown paper or similar substance is put round the portion of writing attempted to be read, the document being against a window pane as in 2.

"4. When, in addition to such a frame as is mentioned in 3, the room is darkened by blind, curtain, or similar means.

"5. When any other means in addition to the above, a magnifying glass, a tube of paper, or artificial light, are employed. Such means should be stated exactly."

The report was as follows:—

"In accordance with the instructions received by me, I have made a careful and minute examination of certain portions of the will of George Fahie Horsford, and I have the honour to report as follows:

"I have attempted to read the passages over which slips of paper have been pasted under the several conditions, and with the result stated below:

"(1.) When the document is simply held up in the air against the light, the writing underneath the slips is visible, but not legible.

"(2.) When the document is held against a pane of the window, a few words can be made out, but not sufficient to convey an intelligible meaning.

"(3.) When the document is held against a pane of the window, and the light is concentrated on the passage to be read, by surrounding it with cardboard or a similar opaque material, the whole of the concealed portion may be read with the exception of two or three words as shewn in the annexed copy.

"(4.) When, in addition to the conditions above defined (3.), the room is darkened by drawing down the blinds, the legibility of the passages in question is not materially affected.

"I used no magnifying glasses or other artificial aids to sight as I did not require them."

The following document was annexed to the report:—

"A copy of so much as can be read, of certain passages in the will of George Fahie Horsford, over which paper has been pasted.

"(The position of illegible words is shewn by dots.)

"(1.) A passage at the bottom of page 1.

'and after her death I leave . . . . .
'Principal to Mary Georgiana and Emily
'Ffinch the daughters of John Drake Ffinch
'Esquire of Greenwich deceased.'

"(2.) A passage at the top of page 3.

"'. . . . . .
'Georgiana and Emily Ffinch the
'daughters of John Drake Ffinch Esq.
'of Greenwich deceased.'

"(3.) A passage at the bottom of page 3.

'(. . . . .) Note.

"'and after her death Λ . . . . . .
'Principal . . . . . Georgiana and
'Emily Ffinch the daughters of John
'Drake.'

"(4.) A passage at the top of page 4.

'. . . . . of Greenwich deceased.'"

"Note.—There appears to be an interlineation here, but it cannot be deciphered."

Mr. Bird also found that the words in question were not more legible at the time when he examined the document, than they would have been at any previous period.

Sir W. Phillimore, (*Searle*, with him), for the plaintiffs, Mary Louisa Ffinch and Georgiana Amy Moberly, who were legatees under the passages of which probate had not been granted. The concealed words are "apparent" within the meaning of the section. The result of the decisions is that obliterated words in a will are "apparent," if they can be deciphered by experts in writing with the assistance of magnifying glasses. [He referred

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to *In the Goods of Beavan* (1); *Townley* v. *Watson* (2); *Lushington* v. *Onslow* (3); *In the Goods of Sir Charles Ibbetson* (4); *Soar* v. *Dolman* (5); *In the Goods of Henry Harris* (6); *In the Goods of McCabe* (7); *In the Goods of Horsford.* (8)]

Bargrave Deane, for the defendant Rosina Horsford Davies, a legatee under the will as proved. The concealed words are not "apparent." The decisions interpret the term as equivalent to "apparent on the face of the instrument." These words are not so, for it is only when light is passed through the back of the instrument that they become visible.

Priestley, for the defendant Thomas Richard Combe, the representative of the deceased executor of the will.

Upjohn, for the defendant John Parkinson Ffinch, the representative of Amelia Thorp, a deceased legatee under the will as proved.

Sir W. Phillimore, in reply. It is submitted that, as under s. 20, there must be complete destruction, so under s. 21 there must be complete obliteration. Words are "apparent" if it is possible by any means to read them. The expression "on the face of the instrument," which is used in the judgments, is merely metaphorical.

Cur. adv. vult.

March 12. THE PRESIDENT. The question in this case, which relates to the will of Captain Horsford, made on April 1, 1868, is whether four passages in that will, over which pieces of paper were pasted subsequent to its execution, are to be admitted to probate. On two of these pieces of paper additions to the will are written, no such writing appearing on the first and last of them. Captain Horsford also executed a codicil of July 29, 1874, in which two portions were covered by pieces of paper pasted on them, an addition to the codicil being written on such pieces of paper.

At the end of 1874, the case of this will and codicil came before Sir James Hannen, and is reported in Law Rep. 3 P. & D.

(1) 2 Curt. 369.
(2) 3 Curt. 761.
(3) 6 Notes of Cases, 183.
(4) 2 Curt. 337.
(5) 3 Curt. 121.
(6) 1 Sw. & Tr. 536.
(7) Law Rep. 3 P. & D. 94.
(8) Law Rep. 3 P. & D. 211.

at p. 211. Sir James Hannen decided that probate should be granted of the will, with the passages covered up in blank, but with regard to the codicil he held that, applying the doctrine of dependent relative revocation, the piece of paper pasted on might be removed, and the words so disclosed admitted to form part of the codicil.

The parties who are now applying to me were not parties to the proceedings in 1874, and it is conceded that they are at liberty to ask me, as they do, to admit the concealed words to probate. I think, therefore, that I have no right to consider myself bound by the above decision of the late President, so far as it turned on a question of fact. By any decision of his on a question of law given in this case, I am, of course, bound exactly as if it had been given in any other case.

The question whether the doctrine of dependent relative revocation ought not to be applied to the concealed passages in the will, as well as to the concealed passage in the codicil, was suggested though not pressed before me. Sir James Hannen decided that this doctrine could not be invoked with regard to the will, though it could with regard to the codicil; but whether it can or not seems to me, in the main, though not entirely, because construction is involved, to be a question of fact rather than of law, depending on the point whether the testator intended by pasting slips of paper over passages in his will to revoke those passages absolutely or to substitute others for them. If it were necessary to decide this matter again, I should not differ from Sir James Hannen's decision; but in the view which I take of the case, it is not necessary. What I propose to consider is whether the words concealed by the pieces of paper are not "apparent" within s. 21 of the Wills Act.

The facts as to the legibility of the concealed words are now clear, and it is the investigation of these facts and the result of such investigation that constitute the difference between the case presented to me, and that which was before Sir James Hannen. Expert evidence was called before me on each side to prove by what means, and how much of, the concealed passages can be read. That evidence was not altogether in agreement,

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though it presented no great differences. At the request of the parties, therefore, I obtained a report from an independent source; and I was fortunate enough to secure the assistance, for which I am greatly indebted, of Mr. Scargill-Bird, the Assistant Keeper of the Public Records. His report, I think, places the facts beyond doubt, and I accept it as my finding. He says:— [The President here read the report.]

Now, am I at liberty to grant probate of the words which Mr. Scargill-Bird has read? The question, I think, turns upon s. 21 of the Wills Act as explained by the authorities. The 20th section of the Wills Act provides that a will or codicil or any part thereof may be revoked by its being burnt, torn, or otherwise destroyed, with the intention of revoking the same. Under this provision, it is clear that even a partial destruction, if the intention of the testator to revoke be shewn, would be effectual to work a revocation. The 21st section deals with obliterations, interlineations, or other alterations in the will made after the execution thereof. It might have been supposed that the legislature would have provided that, if it were clear that by such alteration the testator intended to bring about a partial revocation of his will, his intention should be carried out by his act of alteration. But that is not the provision which the legislature has made. It is enacted that such alteration, whatever the intention of the testator in making it, shall be effectual only if the words or effect of the will before alteration be not apparent, and shall be ineffectual so far as such words or effect shall be apparent. If, then, the words, before alteration, are apparent they must be taken to form part of the testamentary disposition; but if they are not apparent, no extrinsic evidence can be admitted to shew what in fact they were.

The difficulty in the present and in several cases which have been decided is, What is the meaning of the word "apparent" within this section? No case exactly like the present appears hitherto to have arisen. But there are several cases which, dealing with erasures and alterations made of or over words in a testamentary document, shew in what cases words so obscured are considered to be "apparent," and by what means they may be made so "apparent."

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The first of these cases is that of *In the Goods of Sir Charles Ibbetson* (1), decided in 1839. In that case Sir Herbert Jenner Fust said: "The obliterations and erasures should be carefully examined by persons accustomed to inspect writings, in order to ascertain how the will originally stood. Possibly with the use of glasses that may be discovered; but I am quite unable to make it out." In that case, as it turned out, it could not be discovered what the parts obscured originally were.

In the case of *In the Goods of Beavan* (2), decided by the same learned judge in the following year, a word had been altered, but in such a way that the original word remained, beyond question, apparent. In that case probate was granted with the original word.

A more important case is that of *Townley* v. *Watson* (3), decided in 1844. In that case the question dealt with by the same learned judge was whether the words in question must be themselves apparent, or whether they might be proved by extrinsic evidence. The learned judge said, referring to the 21st section of the Wills Act: "What, then, is the interpretation to be put on this section, when either words in a will or the effect of words are so completely effaced or obliterated as not to be apparent? Now, I think the primâ facie construction must be '*apparent on the face of the instrument itself*,' and not that suggested in argument—namely, 'capable *of being made apparent*' by extrinsic evidence. What is an obliteration? Is it not by some means covering over words originally written so as to render them no longer legible? I cannot understand, if the legislature really intended that extrinsic evidence should be admitted, why a few more words were not added which would have freed the section from all doubt; for instance, why was it not thus penned, 'Unless the words should be capable of being made apparent.' There may be inconsistencies, and there may be inconveniences—I do not say there are—in the construction I am putting on the section; but I think it impossible to read the words and not say, it was the intention of the legislature, that if a testator shall take such pains to obliterate certain passages in his will, and shall so

(1) 2 Curt. 337. (2) 2 Curt. 369.

(3) 3 Curt. 761.

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effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament."

The case of *Lushington* v. *Onslow* (1), decided also by Sir Herbert Jenner Fust in 1848, shews, as it appears to me, that in the view of that learned judge resort might be had both to the aid of experts, and to the assistance of magnifying glasses, for the purpose of deciphering obliterated words. In that case the learned judge allowed erased words to form part of the probate, although it must, I think, be clear to every one who looks at the original will, that nothing but the assistance of a very skilful expert, and, I should say, also, of a powerful magnifying glass, could possibly have discovered what the original words were.

The only other case which I think it necessary to mention, before that of the present will, is the case of *In the Goods of McCabe* (2), decided by Sir James Hannen. I do not think that in that case Sir James Hannen expressed any different view, as to the means to which it is allowable to resort for the purpose of deciphering erased words, from that previously expressed by Sir Herbert Jenner Fust, or subsequently expressed by himself. It is true that he says, "It is stated by Messrs. Chabot and Netherclift that they can, with the assistance of a magnifying glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say that they see. If this were the case of a simple obliteration I should not be able to act upon the evidence of those experts, for the Statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent." In that case, Sir James Hannen admitted to probate the words suggested by the experts, accepting extrinsic evidence, on the doctrine of dependent relative revocation, and giving weight to the opinion of the experts only as being consistent with the other evidence. But I think that Sir James Hannen did not intend to say that the aid of experts and magnifying-glasses might not be resorted

(1) 6 Notes of Cases, 183. (2) Law Rep. 3 P. & D. 94.

to in order to determine if words were apparent, but only that in that particular case he was not satisfied with the opinion of the experts that the words could in fact be read by any means. Having looked at the will in question, it seems to me clear that no tribunal could be satisfied that the words were in fact apparent, even though experts professed to be able to read them.

In the case of the present will (1), decided a few months after that last mentioned, Sir J. Hannen quoted with approval a passage in Williams on Executors (2) referring to the means for deciphering allowed by Sir Herbert Jenner Fust, but decided that as chemical agents had not in practice been resorted to in order to remove ink-marks, so a piece of paper pasted on a testamentary document could not be removed.

The result of the authorities, therefore, appears to be that the words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the Wills Act, if experts, using magnifying-glasses, when necessary, can decipher them and satisfy the Court that they have done so; but that it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it.

For the purposes of this case I must hold that a pasting over a piece of paper is an obliteration within the meaning of the Act. It is not, perhaps, an exact use of the word according to ordinary parlance in a case where, as on this codicil, and no doubt on this will, the piece of paper could with perfect ease be removed, leaving the document intact. Parts of a document sealed up under an order for discovery can hardly be said to be obliterated. A picture would rather be said to be concealed than obliterated if a curtain is drawn before it, or a letter if placed in an envelope. If the pasting on of pieces of paper in this case were not an obliteration within the meaning of the Act, then all difficulty would be removed by the very simple process of their removal. But I cannot hold that they did not constitute such an obliteration. In the original sense of the Latin word from which obliteration is derived—in Facciolati's Lexicon "oblitterare" is defined as "aliquid literis superducere"—a placing of a piece of paper

(1) Law Rep. 3 P. & D. 211. (2) 6th ed. p. 139, n.; 9th ed. p. 123, n.

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over writing would be an obliteration; and undoubtedly Sir James Hannen has so held with regard to this will.

In the present case I am satisfied that the words in question may be read by an expert, by the means only of placing an opaque substance, such as a piece of brown paper, round the passages in question, when the page is held against a window pane. These means appear to me to fall well within those permitted by the authorities I have mentioned. If it is permissible to use a magnifying glass, I presume of any strength, and, I should suppose, with or without the additional employment of a lens, by which the light upon the object might be concentrated,—which are all artificial means,—a fortiori, as it seems to me, is it allowable to place a piece of brown paper round an object on which it is desired to discern writing. That is not to resort to artificial means at all. The rays from the object are not deflected, and there is no concentration of light upon it. All that is done is to exclude superfluous light, and the action of thus using a piece of paper appears to me not to differ in principle from the action of a man who shades his eyes in sunshine to look at a landscape, or of a man who forms his hand into a tube the better to enable him to see a picture.

The argument addressed to me against this view turns upon what, I think, is a mistaken interpretation of the words "on the face of the instrument," employed in the judgments from which I have quoted. It is said that, in this case, the words in question are not "apparent" on the face of the instrument, but are made apparent only by transmission of light through the back of the document, and by the words being exhibited against that light. But I do not think that in using the words "on the face of the instrument" the judges, who have employed them, intended to draw any distinction between seeing the front of the document, with no light behind it, and seeing the document with light transmitted through it. They were drawing a distinction between what could be seen to be the contents or effect of the instrument, as against what could be inferred to be its language from extrinsic evidence. To some extent, the use of the phrase appears to me metaphorical, much as one says that a pleading is good or bad on the face of it. I

am by no means sure, however, that even in the strictest sense of the words the writing in question is not apparent "on the face of the instrument," when it is read in the way in which it can be read in this case. The water-mark on foolscap, though generally illegible, if the paper be laid on a table, becomes clear when the paper is held up to the light. It appears to me that in that case the words or date of the water-mark are not only apparent, but apparent on the face of the paper. When an illuminated clock is seen at night, I think that the hands and figures are apparent, and apparent on the face of the clock. Can it be said that, on the moment of the clock being lighted, they cease to be apparent on its face, and become apparent on something else, or on nothing? But even if the writing in question can in this case properly be said not to be "apparent on the face of the instrument," I must remark that the Act of Parliament itself speaks of words being "apparent," and that to insist on their being apparent "on the face of the instrument," in the sense sought to be attributed to the phrase, is to put a gloss on the language of the Act.

I think, therefore, that the words in question as read by Mr. Scargill-Bird are "apparent" within the meaning of the 21st section of the Wills Act, and that, therefore, they should be admitted to probate.

Solicitors for the plaintiffs: *Woodcock, Ryland, & Parker, for Ffinch & Chanter, Barnstaple.*

Solicitors for the defendants: *Surr, Gribble & Co., for H. R. Poole, South Petherton, Somerset; Sharpe, Parker, Pritchards, & Barham, for Homfray, Holberton & Mellor, Brierley Hill; Bompas, Bischoff & Co., for Ffinch & Chanter, Barnstaple.*

H. D. W.

C. A.

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Feb. 28;
March 8.

[IN THE COURT OF APPEAL.]

UNDERWOOD *v.* UNDERWOOD.

Divorce—Order for Permanent Maintenance—The Matrimonial Causes Act, 1866 (29 & 30 *Vict. c.* 32)—*Accord and Satisfaction—Contract—Consideration—Agreement to accept Sum smaller than Amount due under Maintenance Order.*

A wife having obtained a decree nisi for the dissolution of her marriage, an order was made under the Matrimonial Causes Act, 1866, that from the date of the decree absolute the husband should pay her 40*l.* a year by monthly payments. The decree was made absolute, and she married again. Subsequently she and her second husband, by writing not under seal, agreed with the late husband, in consideration of 10*l.* paid to them by him, to give up all claims in respect of the payments directed by the order. At this time 16*l.* was due to the wife for arrears. Subsequently she issued a writ of fi. fa. to enforce payment of 80*l.* arrears of the allowance for maintenance. The President set aside the writ on the ground that it had been issued in contravention of the agreement:—

Held, by the Court of Appeal, that the agreement being for the release of all claims in respect of the maintenance order in consideration of the payment of a sum less than the amount which was at the time due and payable under such order, was invalid for want of consideration, and did not prevent the wife from enforcing payment of the 80*l.*

Appeal from an order of the President (Sir F. Jeune), setting aside a writ of fi. fa. issued by the petitioners against the respondent.

The petitioner, Mrs. Underwood, obtained in 1887 a decree nisi for divorce. On July 10, 1888, an order was made under the Matrimonial Causes Act, 1866, s. 1, "that the respondent do pay to the petitioner the sum of 40*l.* per annum, to commence from the date of the decree absolute herein, and to be payable monthly." The decree nisi was made absolute, and shortly afterwards the petitioner married William Bates.

The respondent paid the alimony till June 10, 1891, when he ceased to make any payments. He represented that he was in very poor circumstances and unable to pay the amount due, and entered into negotiations with Mrs. Bates for a release of the alimony.

On November 11, 1891, Bates and his wife signed an agree-

ment in writing not under seal, made between Bates and wife of the one part and Underwood of the other part, the material part of which was as follows: "Whereas a decree was made and a divorce granted by the High Court of Justice, Probate, Divorce, and Admiralty Division (Divorce), now four years since or thereabouts, in a suit of *Underwood* v. *Underwood*, being the above-mentioned M. A. Bates and Daniel Underwood, and an order for payment of alimony or maintenance moneys was thereupon made by the said Court in the same suit, such payment to be made by the said Daniel Underwood to the said M. A. Bates during her life. Now it is hereby agreed by and between the said parties hereto that in consideration of the sum of 10*l.* this day paid by the said D. Underwood to the said W. Bates and M. A. Bates, the receipt whereof is hereby acknowledged, the said W. Bates and M. A. Bates will not nor will either of them at any time hereafter make any claim or demand upon the said D. Underwood, or sue or institute any proceedings against him in respect of any sum of money, claim or demand, decree or order, made in relation to the alimony or maintenance moneys so ordered to be paid as aforesaid. And for the same consideration the said W. Bates and M. A. Bates do hereby undertake, promise, and agree to release the said D. Underwood from all claims and demands, suits and actions, in respect thereof. In witness, &c."

At the time when this agreement was signed there were due and payable to Mrs. Bates five monthly instalments, amounting to 16*l.* 13*s.* 4*d.* The 10*l.* mentioned in the agreement was paid.

In December, 1893, Mrs. Bates, having been advised that the agreement of November 11, 1891, was invalid, issued a writ of fi. fa. for the amount of arrears then due, which after giving credit for the 10*l.* was 86*l.* 15*s.* 4*d.*

Underwood paid the above sum into court, and moved to set aside the writ of fi. fa. On February 5, 1894, the President set aside the writ of fi. fa. with costs, and ordered that the money should be retained in court for fourteen days; and, if an appeal was filed within that time, it was to remain in court to abide the result of the appeal, if not it was to be paid out to Underwood.

Mrs. Bates appealed.

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Feb. 28. *Stevenson*, for the appellant. The agreement of November, 1891, was invalid. First, it was nudum pactum, not being under seal, and, secondly, the amount due in respect of an order for permanent maintenance is not alienable. With regard to the first objection, the payment of 10*l.* at a time when a larger sum was due and payable is no consideration. A smaller sum cannot be received by way of accord and satisfaction of a larger amount due unless some new consideration is given distinct from money payments towards discharge of the debt: *Cumber* v. *Wane*. (1) The law on this head is summed up by Lord Selborne in *Foakes* v. *Beer*. (2)

Secondly, alimony is an inalienable provision. It is given on public grounds, like the half-pay of a naval or military officer, and cannot be disposed of by the recipient by way of anticipation: *In re Robinson* (3); *Linton* v. *Linton*. (4)

[KAY, L.J. Could not the Divorce Court revoke the order for alimony as regards anything not already received?]

It is submitted that it could not. By the Matrimonial Causes Act, 1866, s. 1, the Court may discharge or modify the order if the husband becomes unable to make the payments, but there is no other power to vary it. It is not alimony within the 92nd of the Rules and Regulations of the Divorce Court, and so liable to be increased or diminished. Here the husband's ability to make the payments is unquestionable.

Bucknill, Q.C., and *Searle*, for the respondent. The President held that there was a sufficient consideration for the agreement, inasmuch as the respondent might have applied to the Court under the Matrimonial Causes Act, 1866, and upon proof that he was unable to pay the arrears due an order would have been made extinguishing such arrears, and exonerating the respondent from future payments. Forbearance from applying for such an order is a consideration for the agreement. That the respondent was so poor that such an application might have been made with a fair prospect of success is evident from the fact that he was obliged to borrow two sums of 5*l.* to make up the 10*l.* which he

(1) 1 Sm. L. C. 8th ed. p. 366; 1 Str. 426.
(2) 9 App. Cas. 605, 613.
(3) 27 Ch. D. 160.
(4) 15 Q. B. D. 239.

paid. The agreement may fairly be construed as not intended to affect the arrears, but only to release the future payments, leaving the arrears still due, and the payment of 10*l.* would be a consideration for such an agreement, its adequacy being a question into which the Court cannot enter. An order for alimony is not a judgment, it is an interlocutory order which the Court can vary. The President, therefore, rightly discharged the writ of fi. fa. as having been issued in breach of faith. Moreover, a fi. fa. was not the proper remedy. By the Matrimonial Causes Act, 1857, s. 52, orders of the Divorce Court are to be enforced in the same way as orders in Chancery, and a writ of fi. fa. was not till recently a remedy used in Chancery. Alimony is a demand of a peculiar nature, and arrears of it do not constitute a debt: *Bailey* v. *Bailey* (1); so that they cannot be recovered under the General Orders, Order XIV., r. 1.

Stevenson, in reply.

[LINDLEY, L.J. Does *Cumber* v. *Wane* (2) apply to a demand liable to be reduced by the Court?]

At the time of the agreement more than 10*l.* was due for arrears, and there is no authority for saying that the Court can release the husband from the arrears, though in case of his inability to pay it can release him from future payments. The distinction between arrears and future payments is strongly drawn in *In re Robinson*. (3) The 10*l.* cannot be a satisfaction for the arrears, which were a liquidated demand; and if so, it cannot be a satisfaction for that demand, plus the future payments, howsoever uncertain they may be. It is impossible to construe the agreement as intended to release only the future payments, for it applies in express terms to every claim or demand in respect of the order for maintenance. [He referred to *Harrison* v. *Harrison* (4) as to the different orders for payment which the Divorce Court can make.]

[THE COURT suggested to the respondent's counsel that the case should stand over for him to make an application to the Divorce Division to discharge or modify the order for maintenance;

(1) 13 Q. B. D. 855.
(2) 1 Sm. L. C. 8th ed. p. 366.
(3) 27 Ch. D. 160.
(4) 13 P. D. 180.

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but it appeared that there was no wish to make any such application.]

Cur. adv. vult.

1894. March 8. LINDLEY, L.J. In this case an order was made in July, 1888, for payment of maintenance to the appellant under 29 & 30 Vict. c. 32, s. 1, which provides that in any case where a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum as mentioned in 20 & 21 Vict. c. 85, s. 32, can be secured, but he nevertheless would be able to make a monthly or weekly payment to the wife during their joint lives, "it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support, as the Court may think reasonable: provided always, that if the husband shall afterwards from any cause become unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court may seem fit."

By s. 52 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), it was enacted that all decrees and orders made under the Act should be enforced in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery. In 1839 the writ of fi. fa. had been introduced into the Court of Chancery, and was at the time of the passing of the Divorce Act an ordinary mode of enforcing an order of the Court of Chancery for payment of money to a person, and by order 203 of the Rules and Regulations of the Divorce Court it is provided that "In default of payment of any sum of money at the time appointed by any order of the Court for payment thereof, a writ of fieri facias, or writ of sequestration, or writ of elegit shall be issued as of course in the registry upon an affidavit of service of the order and non-payment." The allowance for maintenance directed by the order was paid for some time to the appellant,

who had become the wife of William Bates; but in November, 1891, there was due for arrears 16*l.* 13*s.* 4*d.* In that month Mr. and Mrs. Bates entered into a written agreement not under seal with Underwood, the former husband, by which in consideration of 10*l.* paid by him to them they agreed not to make any claim or demand against Underwood in respect of the maintenance ordered to be paid. [The Lord Justice read the agreement.]

If the order of July, 1888, is still in force, 86*l.* 15*s.* 4*d.* is due for arrears of the allowance of 40*l.* Mrs. Bates took out a writ of fieri facias to enforce the payment of these arrears. The learned President set the writ aside as having been issued contrary to the agreement, and the question is whether that agreement is a sufficient ground for setting it aside.

When this agreement was entered into Underwood owed his former wife 16*l.* 13*s.* 4*d.*, for arrears of the allowance of 40*l.*, which he had been ordered to pay. He might have applied to have the order discharged or varied on the ground of his inability to comply with it, but he made no such application, and the 16*l.* 13*s.* 4*d.* was therefore a liquidated sum due from him to his former wife. A payment by him to her of 10*l.* could therefore not discharge it. If so, the same sum cannot be a sufficient consideration for a promise to release it; and still less can the same sum be a sufficient consideration for a promise to release both the 16*l.* 13*s.* 4*d.*, and also all future demands in respect of the 40*l.* a year ordered to be paid. Nor is it possible to treat the 10*l.* as the consideration for the promise to release the future demands, and so make the promise binding as to them, although not as to the 16*l.* 13*s.* 4*d.* In short, turn the agreement about as one will, it is, in my opinion, impossible to avoid the conclusion that it is invalid for want of consideration. To hold it valid is impossible consistently with *Cumber* v. *Wane* (1), and *Foakes* v. *Beer*. (2)

The agreement being invalid, arrears of the allowance ordered to be paid went on accumulating. They ultimately amounted to 86*l.* 15*s.* 4*d.* The former wife was entitled to issue a fi. fa. for that amount, and she issued a fi. fa. accordingly. Underwood sought to set this aside. But again no attempt was made by

(1) 1 Sm. L. C. 8th ed. p. 366; 1 Str. 426. (2) 9 App. Cas. 605.

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him to discharge or vary the order for the payment of the 40*l.* a year; nor when we asked his counsel whether he desired to make an application to discharge it did he express any such desire. Under these circumstances, I am of opinion that the fi. fa. was legally issued, and that the agreement relied upon by Underwood as entitling him to set the fi. fa. aside is not sufficient for the purpose.

The appeal, therefore, must be allowed, and Underwood's application must be refused with costs here and below, and the money paid into Court by him must be paid to his former wife.

KAY, L.J. This appeal is from an order of the Divorce Court, setting aside a fi. fa. which was issued to enforce an order of the same Court for permanent alimony. That order was made upon a former husband, whose marriage with the appellant was dissolved. The alimony was in the form of an annuity of 40*l.*, to be paid in monthly payments.

The ground for setting the fi. fa. aside is that the appellant, who had married again, and her present husband, by an agreement in writing dated November 11, 1891, agreed to release all arrears and future payments of the alimony.

The appellant says that this agreement was without consideration, and was therefore nudum pactum. The nominal consideration was 10*l.*, but the arrears due at the time of the agreement amounted to 16*l.* 13*s.* 4*d.* This was a liquidated debt, and consequently the agreement to release it for 10*l.* was by the rule of law an agreement without consideration. But it is suggested that the release of the future payments makes some difference. If there was no consideration for agreeing to release the 16*l.* 13*s.* 4*d.*, the agreement to release something more cannot make a consideration. It renders the agreement more unreasonable. It is suggested that if there had been no arrears the 10*l.* might have been sufficient consideration for the agreement to release the future payments. But then the 10*l.*, though scarcely more than a nominal consideration, would not have been wiped out by the arrears, as the case is now. The 10*l.* being so absorbed, there was no consideration whatever for the rest of the agreement.

Then it is suggested that possibly a case might have been made under s. 1 of the Act, 29 & 30 Vict. c. 32, for discharging the order for maintenance altogether, by reason of the inability of the divorced husband to pay. We asked his counsel whether he wished to have an opportunity of raising this question, but he declined.

The doctrine exemplified in *Cumber* v. *Wane* (1), that an agreement to release a debt actually due in consideration of the payment of a smaller sum is nudum pactum, has been recently recognised in the House of Lords in *Foakes* v. *Beer*. (2) I am not inclined to depart from a well-settled rule of law by inventing some fine distinction to exempt a particular case from its operation. I confess I am totally unable, having regard to that rule, to see any ground for holding that there was any valuable consideration for this agreement, and I therefore think, with deference to the learned President, that the fi. fa. in this case ought not to be set aside.

I must add that I am not much impressed by the argument that this conclusion is hard upon the divorced husband. That, if it were so, would not be a reason for departing from the law. But on the other hand, to give up 16*l.* 13*s.* 4*d.* actually due, and 40*l.* a year during the rest of the appellant's life for a present payment of 10*l.*, was an agreement so improvident that I cannot feel regret that it should not be enforceable.

A. L. SMITH, L.J. In this case Sir F. Jeune has set aside a writ of fi. fa. issued by a divorced wife to recover the sum of 86*l.* 15*s.* 4*d.* arrears of alimony due to her from her divorced husband under an order of the Divorce Court dated July 10, 1888, and he did so upon the ground that by a contract in writing dated November 11, 1891, but not under seal, the divorced wife, in consideration of 10*l.* then paid to her, had agreed to release the divorced husband from all alimony payable to her.

At the date of this agreement the sum of 16*l.* 13*s.* 4*d.* was due and unpaid to the wife for alimony.

It is contended upon this appeal by the wife that this agree-

(1) 1 Sm. L. C. 8th ed. p. 366; 1 Str. 426. (2) 9 App. Cas. 605.

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ment affords no answer, for it cannot be enforced in a Court of law by reason of it being made without consideration, and the well-known rule of law was brought out, viz., that payment of a lesser sum cannot support an accord to forego a larger sum then due.

It has been decided ever since the days of *Cumber* v. *Wane*, in the year 1718 (1), affirmed in the House of Lords as late as 1884 in the case of *Foakes* v. *Beer* (2), that a debtor does not establish the defence of payment, or accord and satisfaction, upon proof that his creditor has agreed to forego his debt then due in consideration of payment of part only of that debt, for payment of part only of what is due can constitute no consideration moving from the debtor to the creditor to uphold the promise of the creditor to forego the residue of his debt. It was, however, argued that alimony was not a debt to which the doctrine laid down in *Cumber* v. *Wane* (3) applied, for it was said that it was a debt which there was a possibility of getting rid of by obtaining an order vacating the order for the alimony; and that, upon application made upon proper materials, the judge of the Divorce Court might do so, and that such materials existed in the present case, upon which the husband could have founded such an application, and that, if successful, the wife's right to the 16*l.* 13*s.* 4*d.*, as well as to the residue of the alimony, might have gone. Sir F. Jeune took this view, and held that, as there was this possibility, the 16*l.* 13*s.* 4*d.* was not an ascertained debt due to which *Cumber* v. *Wane* (3) would apply.

It is here that my difficulty arises. How can the possibility of getting the order for maintenance set aside render the 16*l.* 13*s.* 4*d.* not an ascertained debt then due? Till set aside the 16*l.* 13*s.* 4*d.* is an ascertained debt due, and if the application fails the debt remains just what it was before.

I will point out that there is always the possibility of a debtor becoming bankrupt, yet this surely cannot make an ascertained debt due before the bankruptcy not to be such a debt.

In either of these cases there is a possibility of the debt being got rid of, but until it is got rid of I cannot see, nor can I hold,

(1) 1 Str. 426. (2) 9 App. Cas. 605.
(3) 1 Sm. L. C. 8th ed. p. 366; 1 Str. 426.

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that it is not an ascertained debt due in presenti. If such a possibility sufficed to alter an ascertained debt into what is not an ascertained debt, it seems to me that it would really eat up the decision of *Cumber* v. *Wane*. (1)

I agree that if the divorced husband had agreed not to take any proceedings to, if possible, vacate the order for alimony, then a new consideration over and above the payment of the 10*l*. would have existed, and would have sufficed to uphold the promise of the divorced wife not to further insist upon the alimony ordered; but there has been no such agreement in this case, and twist it and turn it as you will, all that has taken place as regards a consideration moving from the debtor is a payment by the debtor to his creditor of a less sum than the debt then due, and this, as before pointed out, will not uphold an assumpsit.

We offered the divorced husband time to make an application to the learned judge to see if he could get relief from the alimony, but this was refused, and, in my judgment, for the reasons above this appeal must be allowed.

Appeal allowed.

Solicitors: *Law & Worssam, for Buckby, Leicester; Preston, Stow, & Preston.*

(1) 1 Sm. L. C. 8th ed. p. 366; 1 Str. 426.

H. C. J.

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April 3, 4.

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Admiralty—Ship—Repairs—Powers of Managing Owner—Liability of Co-owners.

The authority of the managing owner of a vessel extends to the conduct on shore of all that concerns the employment of the ship, so that co-owners in deputing to him the management of the vessel on their behalf thereby give him power to pledge their credit for what is necessary to repair her, so as to enable her to be employed in the ordinary course of trade suitable for the vessel, and it makes no difference in the liability of the co-owners that the managing owner has instructions to insure and has, in fact, collected the money from the underwriters to discharge a claim for heavy repairs consequent on damage sustained by the vessel.

Action by plaintiffs, the Smith's Dock Company, Limited, to recover jointly and severally from the defendants the balance of an account for repairs to the steamship *Huntsman*, executed by the plaintiffs on the order of W. J. Jobling, manager and owner of fifty-one sixty-fourth shares. The defendants were J. H. Culliford and J. L. Clark, joint owners of two sixty-fourth shares in the vessel, and T. E. Jobling, owner of one sixty-fourth share.

The material facts were :—

On January 13, 1892, the plaintiffs entered into an agreement with W. J. Jobling, the managing owner of the *Huntsman*, on the terms of "no cure no pay," for 2000*l.* net cash, with 200*l.* extra for despatch, to float off and dock the vessel then lying stranded near the entrance to the River Tyne. The plaintiffs did not earn the 200*l.*, but the salvage operations were successful, and by January 30 the vessel was brought into their own dry dock. The plaintiffs then tendered to repair her, in accordance with specifications, for 10,500*l.*, taking the risk of what the extent of the repairs might turn out to be; and the underwriters agreed to pay W. J. Jobling, on behalf of the owners of the vessel, a lump sum for the salvage and repairs on the basis of the proportion between 10,500*l.* and the actual amount insured, making about 7000*l.* payable by them. The tender was not accepted; but on February 9 the plaintiffs commenced repairing the vessel, under instructions from the managing owner,

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equivalent to an open order to do what was necessary to the *Huntsman* to put her in a seaworthy condition at usual prices. Between February 24 and July 7, the underwriters paid W. J. Jobling, as managing owner, sums amounting in the aggregate to 6945*l.* 18*s.* 3*d.*, and between March 4 and June 17 W. J. Jobling paid the plaintiffs, by four cheques for 500*l.* each, the 2000*l.* due for salvage. On March 9 the repairs to the *Huntsman* (which had sustained injuries in the bottom and in the engine-room, as well as generally needing overhaul from having been under water) were so far completed that she could proceed with her loading, and the managing owner removed her from the plaintiffs' dry dock; but the plaintiffs' workmen remained on board to finish the repairs until March 20, when the vessel went to sea, and was subsequently worked by the managing owner in the ordinary way for the benefit of the co-owners. On April 14 a detailed account, for the repairs, amounting to £4516 6*s.* 11*d.*, was delivered by the plaintiffs to W. J. Jobling, headed "W. J. Jobling, Esq., and owners of the steamship *Huntsman*." On July 20 the plaintiffs drew on W. J. Jobling, and he accepted "for self and co-owners," four bills for 1000*l.* at three, four, six, and six months respectively. The first bill for 1000*l.* was duly honoured at maturity. Of the second bill 510*l.* was paid, and a renewal, accepted by W. J. Jobling in his own name only, was taken for 496*l.* 12*s.* 6*d.*—that is, 490*l.* and 6*l.* 12*s.* 6*d.* interest. The third and fourth bills were renewed when they fell due on January 23, 1893, by a bill for 2000*l.* at three months, accepted by W. J. Jobling in his own name only, cash 26*l.* 11*s.* 6*d.* for interest being paid at the time; and on the same day, as the plaintiffs had agreed to reduce their account to 4185*l.*, a bill for 185*l.* at three months was accepted by W. J. Jobling in his own name only, representing the balance of what was due to the plaintiffs. Of the renewal for 496*l.* 12*s.* 6*d.*, 246*l.* 12*s.* 6*d.* was paid, and a renewal, accepted by W. J. Jobling in his own name only, for three months, was taken by the plaintiffs for 349*l.* 14*s.* 10*d.*, made up of 250*l.* and a sum of 99*l.* 14*s.* 10*d.*, due on three old outstanding small accounts for repairs in 1890, 1891. The bill for 185*l.* was dishonoured, as were also the renewals for 2000*l.* and 349*l.* 14*s.* 10*d.*, making together the amount now sued for, viz., 2534*l.* 14*s.* 10*d.*

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According to the evidence of Eustace Smith, managing director of the plaintiff company, the repairs executed were such as were necessary to make the vessel seaworthy and fit to earn freight in general employment as a trading vessel of her class, and everything was done by the plaintiffs to get cash from the managing owner as representing the owners of the vessel, and bills were only taken on failure to obtain ready money. He further stated that, although he knew that the vessel was insured, and that a Mr. Wawn, who put forward the specifications, was acting for the underwriters, the managing owner, after the plaintiffs' account was sent in, told the witness that he had not received money from the underwriters, and was not in a position to pay cash. The same statement was made repeatedly afterwards, when the plaintiffs pressed W. J. Jobling for payment and when the bills were renewed.

On March 15, 1893, W. J. Jobling became insolvent, and made an assignment to a trustee for the benefit of his creditors. On May 28 the last of the bills fell due. On June 14 the writ in the action was issued against the present defendants (1), and by their statement of claim the plaintiffs alleged that W. J. Jobling was duly authorized by the defendants to order the repairs.

The defence in substance was that the repairs were of such a nature and extent as not to be within the scope of the authority of W. J. Jobling, as managing owner, to order so as to pledge the credit of the defendants without their express authority. Secondly, in the alternative, that if their credit had been pledged the defendants were discharged from liability, for the plaintiffs knew, before parting with their possessory lien, that W. J. Jobling had received from the underwriters a sufficient sum in cash to pay for the repairs, but had elected to give W. J. Jobling credit and take acceptances in lieu of cash, and, for his personal accommodation, renew those acceptances, thereby prejudicing the position of the defendants, and inducing them to believe that the claim of the plaintiffs had been paid by the managing owner. Thirdly, the defendants paid 99*l.* 14*s.* 10*d.* into Court with a denial of liability and without specific appropriation, but sub-

(1) The names of the owners of the remaining ten sixty-fourth shares were not included in the writ.

sequently admitted that the plaintiffs were entitled to this amount in settlement of the small outstanding accounts above mentioned.

Moulton, Q.C., and *H. F. Boyd*, for the plaintiffs.
Sir Walter Phillimore, and *F. Laing*, for the defendants.

The arguments of counsel fully appear from the judgment. In addition to the cases of *Robinson* v. *Read* (1) and *Davison* v. *Donaldson* (2) there cited, the following were referred to: By counsel for plaintiffs: *Bottomley* v. *Nuttall* (3); *Whitwell* v. *Perrin.* (4) By counsel for defendants: *Mitcheson* v. *Oliver* (5); *Brodie* v. *Howard* (6); *Chappell* v. *Bray* (7); *Frazer* v. *Cuthbertson* (8); *Steele* v. *Dixon.* (9)

GORELL BARNES, J. (after stating the nature of the case, and finding that there was no reason to doubt the accuracy of the statements of the managing director of the plaintiff company as to pressing the managing owner of the vessel for cash, the learned judge proceeded:—) The defendants take the following points, viz., first, that, although Mr. W. J. Jobling was the managing owner, or, in other words, the ship's husband, of the *Huntsman*, he had no authority to order these repairs upon the credit of the co-owners.

Counsel for the defendants put the point in this way, that a managing owner, or ship's husband, has no authority to order repairs for a ship, upon the credit of the co-owners, although the repairs are absolutely necessary for her proper employment as a seaworthy ship, if that ship is insured, and if, in the ordinary course, the managing owner would be able to collect from the underwriters enough to pay the amount of the repairs ordered, and by those moneys so received to discharge the bills.

Dealing first with the suggestion as to this limited nature of the authority of a managing owner, it seems to me that, so far as

(1) 9 B. & C. 449.
(2) 9 Q. B. D. 623.
(3) 28 L. J. (C.P.) (N.S.) 110.
(4) 4 C. B. (N.S.) 412.
(5) 5 E. & B. 419.
(6) 17 C. B. 109.
(7) 6 H. & N. 145.
(8) 6 Q. B. D. 93.
(9) 3 Sc. Sess. Cas. 4th Series, 1003.

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they have been referred to, the authorities and the language of the text-writers are entirely in favour of the proposition maintained by the plaintiffs' counsel—that the managing owner has authority to give orders for the necessary repairing of the vessel. It seems to me that the contention of the counsel for the plaintiffs is correct if the manner in which the question arises is considered. The managing owner is deputed by the co-owners to employ the vessel for their benefit, and that can only be done by employing her in the ordinary course of trade suitable for such a vessel. It must follow, I think, as a necessary consequence, that he has authority to conduct and manage on shore whatever concerns the employment of the ship, and for that purpose has authority to give orders for the necessary repair, fitting, and outfit of the vessel, in addition to seeing that she is properly manned, properly sent to sea, and properly chartered for a voyage. Without that power he would be unable to send the ship to sea, even if there were trifling repairs rendered necessary for that purpose, without obtaining a fresh mandate from the various co-owners; and I cannot see that there is any authority for the proposition that the managing owner's authority is limited in cases where the ship is insured. No case, or even dictum, has been cited to that effect, and the true relationship seems to me to be that the co-owners in deputing to the managing owner the power to manage the vessel on their behalf, depute to him power to do what is necessary to repair her for the proper purpose of performing her engagements in the ordinary course of her employ. Of course, if the vessel is insured, they will afterwards get the benefit of any money paid by the underwriters, collected by the managing owner, and applied by him, if so applied, to discharge the accounts for repairs.

It is, however, suggested by the defendants that the plaintiffs looked to Mr. W. J. Jobling as the channel through which the money would come from the underwriters; in other words, that the plaintiffs acted only on the credit of Mr. W. J. Jobling. I see no ground for that contention. On the contrary, I think that the plaintiffs acted in the ordinary way by treating Mr. Jobling as managing owner acting on behalf of the various co-owners.

The plaintiffs' representative, Mr. Eustace Smith, said: "I believed Mr. Jobling was solvent, and I knew we were safe in any case, because we had the co-owners: Culliford and Clark we knew were good enough." And the plaintiffs sent in their bill to the managing owner and owners of the steamship *Huntsman* in the ordinary course.

Then comes the point which has been very fully argued before me, that the plaintiffs so dealt with Mr. W. J. Jobling by taking and renewing the bills as to discharge any claim they may have had on the co-owners. If it had been shewn that the plaintiffs could have had cash from Mr. Jobling, and, instead of taking it, elected to take bills from him, they would then be in the position of practically having had, so far as the other owners are concerned, not what is really payment, but what is tantamount to it. Where, however, they have not had the power to get cash, but have tried to get it and failed, and have merely taken bills on account, it seems to me there is no election whatever on their part to renounce any right they had which would in any way discharge the claim made upon the present defendants. I think that is in accordance with the views expressed in the cases of *Robinson* v. *Read* (1) and *Davison* v. *Donaldson.* (2)

The further point which was taken by the defendants is that the plaintiffs have so acted as to mislead the co-owners and raise an equity against themselves. I understand that to be based upon the contention, that as the vessel was assumed by the plaintiffs to be insured, and as they might suppose that the money from the underwriters was paid to Mr. Jobling, if they renewed the bills, or allowed the time to go by for payment without finding out why he did not pay them and whether he had got the money, then they cannot look to the defendants for payment. I understand that is the way it is put on behalf of the defendants. The answer to this part of the case seems to be that the plaintiffs did what they could to get the cash, and were told by Mr. Jobling that he had not got it, and that he had not received the money from the underwriters.

I cannot see any ground for the suggestion that the plaintiffs

(1) 9 B. & C. 449. (2) 9 Q. B. D. 623.

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have so acted as to mislead the defendants, and thereby prejudice them.

For these reasons I am of opinion that the plaintiffs are entitled to make their present claim against the defendants. It has been agreed between the parties that a sum of money equivalent to one small item of 99*l.* 14*s.* 10*d.* paid into court should be taken out by the plaintiffs, with the costs up to the time it was paid in; and as that sum is included in the claim of 2534*l.* 14*s.* 10*d.*, which will by agreement go to the registrar and merchants to be assessed, the amount will in any event be reduced to that extent.

Solicitors for plaintiffs: *King, Wigg & Co., for Clayton & Gibson, Newcastle-upon-Tyne.*

Solicitors for defendants: *Botterell & Roche.*

T. L. M.

1894

April 6

[IN THE CONSISTORY COURT OF ST. ALBANS.]

THE RECTOR AND CHURCHWARDENS OF ST. ANDREW, ROMFORD *v.* ALL PERSONS HAVING INTEREST, &c.

Ecclesiastical Law—Faculty—Chancel Screen—Discretion of Ordinary to refuse Faculty for Erection of Chancel Screen Gates.

The rector and churchwardens of a parish church in the diocese of St. Albans petitioned the Ordinary for a faculty to authorize the erection in the church of a chancel screen with gates in the centre, by the closing of which access to the chancel from the nave of the church would be wholly cut off, and at the hearing of the suit it appeared that if the faculty were granted and the screen erected as proposed, the gates to it would be kept open during the performance of divine service, but would be fastened at other times when the church was opened, and, being so fastened, would afford protection against the contents of the chancel and vestries being injured or stolen.

The Chancellor of the diocese of St. Albans being of opinion that the grant of a faculty, authorizing the erection of the gates, would be an exercise of his discretion in opposition to the decision of the Court of Arches in *Bradford* v. *Fry* (4 P. D. 93), refused the faculty as prayed, but intimated that if the petitioners desired, the Court would decree a faculty to issue for the erection of the chancel screen without any gates to it.

THIS was a cause of faculty instituted on behalf of the Rev. Herbert Hippisley Stephens, the rector, and L. F. Makin and J. Corbin, the churchwardens of the parish church of St. Andrew,

Romford, in the diocese of St. Albans, for the purpose of obtaining the grant of a faculty for the erection in the said church of a wrought iron chancel screen, having in the centre of it gates in accordance with a design annexed to the petition in the suit, and the raising of a portion of the chancel wall of the church about a foot in height, in order to obtain an uniform level for the base of the proposed screen.

The usual citation issued in the suit on March 20 last, and was duly served, but no appearance was entered on the part of any opponent, and the cause was now heard before the Chancellor of the diocese of St. Albans (Alfred Bray Kempe, Esq.), sitting in the church of St. Andrew, Romford.

The rector of the parish was examined orally in support of the petition. He stated inter alia that the church was always open on week days for private prayer from after the early morning service until sunset; that it was situate within 100 yards of a main road, there being also a public footpath through the churchyard frequented by workmen and others; that under the present arrangement, there being no separation between the chancel and the nave, anybody having access to the church could freely enter the vestries opening out of the chancel where the church plate and other property were kept, and that surplices had been stolen out of the choir vestry and the organ so tampered with by unauthorized persons that it had to be renovated. The result of the remainder of his evidence is stated in the judgment.

Priestley, for the petitioners. In sanctioning the erection of the proposed chancel screen with the gates attached to it, the Court would not be acting contrary to law, and consequently the only question to be decided is whether, in the exercise of the discretion of the Court, the faculty asked for ought not to be granted? *Beal* v. *Liddell* (1); *Bradford* v. *Fry*. (2) The design and dimensions of the proposed screen and gates, and the evidence of the rector of the parish, shew that in this case the addition of gates to the screen will be of utility, since, by having them fastened on the many occasions when the church is opened for private devotion, a material protection not now

(1) Moore, Special Report. (2) 4 P. D. 93.

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existing will be given against the contents of the chancel and the adjoining vestries being injured or stolen. The present case is, therefore, essentially different from the cases of *In re St. Augustine, Haggerston*, (1) and *The Vicar of the Church of the Annunciation, Chislehurst* v. *The Parishioners of the Same.* (1) In those two cases faculties for the erection of chancel screen gates were refused; but no evidence was before the Court in either case that the gates in the screen would serve any useful purpose, while, in the subsequent case of *In re St. Agnes, Toxteth Park* (2), a faculty for a chancel screen with gates issued out of the Consistory Court of Chester on its being shewn in evidence that the closing of the chancel screen gates would be a useful protection to the chancel and the property therein. (3) The discretion vested in the Court, a discretion to be exercised on a consideration of all the circumstances of the case, ought to be exercised in favour of the petitioners, and the erection of the screen, with the proposed gates, be authorized.

THE CHANCELLOR. In this case the rector and churchwardens of the parish of St. Andrew, Romford, petition the Court to decree the grant of a faculty authorizing the erection of a chancel screen in the parish church in accordance with a design accompanying the petition. The proposed screen is to be erected in memory of the late rector, whose desire was to see such an addition made to the ornaments of the church; it has been approved by the vestry, and the cost has been fully provided for. The screen is to be of wrought iron; it is of handsome and suitable design, and will not obstruct the view of the holy table from the body of the church. No appearance has been entered in opposition to the grant of the faculty; but this circumstance does not entitle the petitioners to have the prayer of their petition acceded to as a matter of course. The Court would not be justified in giving its sanction to anything which it could not legally or properly sanction merely because there is no opponent before it to urge

(1) 4 P. D. 111.

(2) 11 P. D. 1.

(3) See *Re The Church of St. John, Isle of Dogs*, Tristram, p. 67; *The Vicar and Churchwardens of St. James, Norlands* v. *The Parishioners of the Same.* Consistory of London, April 26, 1894.

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the illegality or impropriety of that which it is asked to authorize. The design of the proposed screen shews that it is intended that there shall be gates in the centre, by the closing of which access to the chancel from the body of the church may be wholly cut off. It is not proposed to close these gates during the times of divine service, but only at such times as the church is kept open for private prayer (a practice which the Court would be certainly most anxious to encourage in every possible way), the object of so closing the gates being to prevent evilly-disposed persons from entering the chancel and injuring its contents and those of the vestries which open into it. The height of the gates, according to the design, is 3 ft. 6 in. at the sides, and 4 ft. in the middle, there being a lofty arched doorway in which they are placed, the remainder of the proposed screen rising several feet above them. Now the decision in 1878 of the present Dean of the Arches in the case of *Bradford* v. *Fry* (1) has placed it beyond question in this Court that chancel screen gates are not illegal. But it is the duty of the Court further to consider whether in the exercise of its discretion it ought to give the legal sanction of a faculty to them. The discretion to be exercised must be a judicial discretion; it is subject to review and correction in the Court of Appeal (*Butt* v. *Jones* (2)), and is, therefore, as it appears to me, a discretion which a Court of first instance ought not to exercise so as to authorize anything which the judge of the Appellate Court has pronounced in general terms to be objectionable and has refused to sanction. Chancel gates in parish churches do appear to me to have been so pronounced in the case of *Bradford* v. *Fry* (1)—the case to which I have already referred. If the decision of the Dean of the Arches in that case refusing to sanction the retention of the chancel screen gates in the church of St. James, Hatcham, is really directed only to the particular circumstances of the case, and must not be regarded as a general judicial statement that gates in a chancel screen in a parish church, separating the chancel from the body of the church, though not illegal, are objectionable, and would not be sanctioned by the Appellate Court, that can and ought to be made clear by an appeal. But,

(1) 4 P. D. 93. (2) 2 Hagg. Ecc. 417, at p. 424.

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as at present advised, I am unable to take the view that I am at liberty to put such interpretation upon the decision of the learned Dean of the Arches. In deciding that a confirmatory faculty might issue authorizing the retention of the chancel screen which was in question, provided that the gates attached to it were first removed, but that unless such gates were removed a faculty should issue authorizing the respondent to remove the whole screen, the Dean of the Arches made no reference whatever to any circumstances or reasons special to the particular case, but, after stating that he saw nothing objectionable in the screen, added, "but I do think that the gates attached to the screen are objectionable for the reasons given by Dr. Lushington in *Beal* v. *Liddell*." (1) Now, no doubt, as has been pointed out by Mr. Priestley, Dr. Lushington in the case referred to does not give specific reasons for regarding the gates as objectionable; but he uses language which indicates plainly enough what his reason was. He states that "such separations between the chancel and nave are objectionable," adding that he "would not advise the bishop to consecrate a church fitted up according to this example," statements which shew clearly that his reason for regarding a chancel screen with gates as objectionable was that it effected a separation between the nave and chancel which ought not to be sanctioned. These statements must, moreover, be read in connection with a passage which occurs a few lines before, viz., "With respect to the brazen gates at St. Barnabas, they are connected with the screen which separates the nave from the chancel; and it is said that they are kept locked when public worship is not being performed, for the protection of the church furniture and ornaments within the chancel, the doors of the chapel being left open during a great part of the day. I do not approve of this screen or gates, and still less of the reason for keeping the gates closed. I regret that there should be ornaments patent in midday which would tempt to dishonesty; . . ." (2) from which it is obvious that Dr. Lushington's objection to the screen on the ground that it effected a separation between the chancel and the nave was not weakened by the fact that such separation afforded a protection to the church furniture and ornaments

(1) Moore, Special Report. (2) Moore, Special Report, at p. 77.

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The Chancellor.

within the chancel. It appears to me, therefore, that by his reference to the judgment of Dr. Lushington, the present Dean of the Arches must be taken to have based his objection to chancel gates on the ground that, though they might afford a protection to the church furniture and ornaments within the chancel, they effected a separation between nave and chancel which was objectionable and would not be sanctioned. Whatever, then, might be the decision of the Court in this case had it an unfettered discretion—and I ought to say that if the protection of the contents of the chancel and vestries were a sufficient ground for exercising my discretion in favour of allowing these gates, very strong reasons for so exercising it have been laid before the Court—I must, as matters now stand, decline to exercise my discretion in a way which would be in opposition to what I understand to be the judgment of the Appeal Court in *Bradford* v. *Fry* (1), none the less so because such an exercise, through the absence of any opponent, would not be subject to review and correction on appeal. Apart from the gates, it is clear from the same case of *Bradford* v. *Fry* (1), that a chancel screen such as that here proposed is wholly unobjectionable. The Court is prepared, therefore, to decree a faculty authorizing the erection of the screen without the gates, but so far as the gates are concerned the application must be refused.

Solicitor for petitioners: *Clifton.*

(1) 4 P. D. 93.

C. F. J.

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[IN THE COURT OF APPEAL.]

THE GLENDARROCH.

Admiralty—Damage to Cargo—Bill of Lading—Breach of Contract—Perils of the Sea—Negligence—Onus of Proof—New Trial.

The plaintiffs brought an action against the defendants for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea; but the President (Sir F. H. Jeune) ruled that in order to excuse themselves for the damage to the goods it lay on the defendants to shew, not only a peril of the sea, but a peril of the sea not occasioned by their negligence.

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.JJ.), that as the loss apparently fell within the exception, the burden of shewing that the defendants were not entitled to the benefit of the exception, by reason of negligence, lay upon the plaintiffs.

The observations of Lord Herschell in *The Xantho* (12 App. Cas. 503, at p. 512) explained.

Appeal by the defendants, Wainwright Brothers & Co., against a decision of the President (Sir F. H. Jeune) in favour of the plaintiffs, J. C. Johnson & Co. and H. F. Currie & Co., shippers and consignees respectively of certain sacks of cement damaged by water whilst being conveyed by the defendants in the steamship *Glendarroch*.

At the trial before Sir F. Jeune, President, assisted by two of the Elder Brethren of the Trinity House, it appeared that the action was for breach of duty and breach of contract in and about the carriage of the cement which had been shipped in the defendants' vessel. The vessel stranded on St. Patrick's Causeway in Cardigan Bay, and the cement sustained such damage as to be valueless.

No bill of lading had in fact been signed; but the learned judge found that the plaintiffs' goods were carried on the terms of an ordinary bill of lading excepting perils of the sea, but not excepting negligence.

The defendants relied upon the exception in the bill of lading exempting them from liability in respect of perils of the sea;

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but after argument, in which counsel for the plaintiffs referred to *The Freedom* (1) and to the observations of Lord Herschell in *The Xantho* (2), and counsel for the defendants referred to *The Helene* (3), *Pandorf* v. *Hamilton* (4), and *Czech* v. *General Steam Navigation Co.* (5), the learned judge ruled that, in order to excuse themselves for the damage to the goods, it lay on the defendants to shew, not only a peril of the sea, but a peril of the sea not occasioned by their negligence. Thereupon counsel for the defendants declined to call any evidence, and counsel for the plaintiffs asked for and obtained judgment for the agreed value of the goods, viz.: 335*l.* 16*s.* 1*d.*

On appeal:—

Joseph Walton, Q.C., and *W. F. Taylor*, for the appellants (defendants). It is submitted that the ruling of the learned judge in the Court below was wrong. The loss of the goods was admitted, and the defendants also admitted that the burden of proving that the loss was caused by an excepted peril lay on them; but as the plaintiffs contended that the defendants should not be allowed to avail themselves of the exception on the ground that the loss would not have happened without the negligence of the servants of the defendants, the burden was shifted, and it was incumbent on the plaintiffs to prove the negligence. In *The Norway* (6) it was held that the plaintiff, suing upon a bill of lading excepting perils of the sea, was bound to prove affirmatively, and not merely by way of conjecture, that the stranding of the ship which led to the damage to the plaintiffs' cargo was occasioned by the negligence of the defendants' servants, and the Privy Council were of opinion that the burden of proof was not satisfied, and that the loss was by perils of the sea. The same view was taken by the Privy Council in *The Helene*. (3) It is clear upon the authorities before the Judicature Acts that if there is a contract by the terms of which the carrier is

(1) Law Rep. 3 P. C. 594.

(2) 12 App. Cas. 503, at p. 512. The passage in question is set out in the judgment of Lopes, L.J.

(3) Br. & L. 429, at p. 433; Law Rep. (*Ohrloff* v. *Briscall*) 1 P. C. 231, at p. 238.

(4) 12 App. Cas. 518.

(5) Law Rep. 3 C. P. 14.

(6) Br. & L. 404, at pp. 407, 408.

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exempted from loss not arising from negligence, and the plaintiff intends to rely upon the negligence, he must take the point either in the declaration or in the reply, and prove it. The forms of pleading all proceed upon this view of the onus of proof, for to a declaration for non-delivery of goods, a plea of a peril of the sea was a good plea and not demurrable, so that it rested with the plaintiff to reply, or specially assign, negligence. In *Phillips* v. *Clark* (1), decided on demurrer, the plaintiff by his replication set up the negligence of the defendant as the cause of the damage to his goods. In *Martin* v. *Great Indian Peninsular Ry. Co.* (2), also decided on demurrer, there was a special replication of negligence.

In *Wyld* v. *Pickford* (3), also decided on demurrer, Parke, B., says: "A third objection was that the plea ought to have gone on to allege, that the loss was not occasioned by such negligence as the defendants were responsible for, notwithstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz., that such negligence should have been replied, or, more properly speaking, newly assigned." In *Grill* v. *General Iron Screw Collier Co.* (4), the defendants pleaded that they were prevented from carrying and delivering the goods by the excepted perils; and the plaintiffs specially replied that those perils were caused by the negligence of the defendants by their servants. The pleadings in this case are referred to in Bullen & Leake's Precedents of Pleadings. (5) In *Czech* v. *General Steam Navigation Co.* (6), there was no replication because there was a special averment of negligence in the declaration, and it was held that the plaintiffs, who were the shippers of the damaged goods, must prove affirmatively the negligence of the defendants' servants.

The two Scotch cases of *Craig* v. *Delargy* (7), and *Dobbie* v. *Williams* (8) are directly in point, and lay the law down correctly in accordance with the English decisions. The result is that, where the shipowners' common law liability is limited by

(1) 2 C. B. (N.S.) 156.
(2) Law Rep. 3 Ex. 9.
(3) 8 M. & W. 443, at p. 459.
(4) Law Rep. 1 C. P. 600; 3 C. P. 476.
(5) 3rd ed. p. 555.
(6) Law Rep. 3 C. P. 14.
(7) 16 Scotch L. R. 750.
(8) 21 Scotch L. R. 667.

contract in this way, actual negligence must be proved: see *Peninsular and Oriental Steam Navigation Co.* v. *Shand.* (1)

Sir Walter Phillimore, and *J. A. Hamilton,* for the respondents (plaintiffs). In order to exonerate the shipowner under the exception, the peril of the sea must be sea damage not occasioned by negligence. In *Pandorf* v. *Hamilton* (2), Lopes, L.J., defined damage from a peril of the sea as "damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody"; and Lord Bramwell, in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (3), quotes this definition with approval. Hence it lies on the defendants to shew a peril of the sea not brought about by their negligence. In *Taylor* v. *Liverpool and Great Western Steam Co.* (4), it was held that it lay upon the defendant shipowner to bring the loss within the exception in the bill of lading as to thieves by shewing by whom the theft of the box of diamonds had been committed, and, this not having been done, the plaintiffs were held entitled to recover. In *The Xantho* (5), it is clear that the inclination of Lord Herschell's mind was in favour of holding, if it had been necessary, that the defendant shipowners, to bring themselves within the exception, must shew that the loss of the plaintiffs' goods was not due to a cause induced by their negligence.

Joseph Walton, Q.C., in reply. Lord Herschell, in *The Xantho* (5), expressly says that the point as to the shifting of the onus of proof was not before the Court, and he intentionally abstained from giving any opinion. In the same case Lord Bramwell remarked (6), "I say nothing about burden of proof." The older authorities are therefore unaffected, and the burden of proof in the present case was on the cargo-owner.

LORD ESHER, M.R. We have to treat this case as if the contract were in the ordinary terms of a bill of lading. The contract being one on the ordinary terms of a bill of lading, the

(1) 3 Moo. P. C. (N.S.) 272, at p. 293.
(2) 16 Q. B. D. 629, at p. 633.
(3) 12 App. Cas. 484, at p. 492.
(4) Law Rep. 9 Q. B. 546.
(5) 12 App. Cas. 503, at p. 512.
(6) 12 App. Cas. 503, at p. 515.

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goods are shipped on the terms that the defendant undertakes to deliver them at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading.

The exception relied upon by the defendants is that the goods were lost or damaged by a peril of the sea; and upon that, it is alleged that, even though that be true, yet that peril of the sea was the result of negligent navigation on the part of the defendants' servants.

The law is that if that be made out the defendants have no defence, and the plaintiffs are entitled to succeed, and the real question is, how is that to be made out? By which of the parties is it to be made out?

It is to be decided according to the practice of the law courts; and the question is, how is that result to be arrived at? The terms of the bill of lading as they stand on paper are, except the loss be from perils of the sea. But then it is said that, nevertheless, if the perils of the sea are produced by the negligence of the defendants' servants, then that loss cannot be relied on by the defendants. How can that be unless there be an irresistible inference that such exception does exist in the contract, though it is not written in it, so that the exception must be read into it as if it were in it? Therefore, we must try and see whether this stipulation as to negligence must be written in, or be considered as written in.

The liabilities of shipowners under a bill of lading are in that part which precedes the exceptions. Is this stipulation about the loss being the result of the negligence of the shipowners' servants—although within the terms of the exception—is that to be written in before the exceptions or not? The first thing that strikes one is that in that part of the contract it is not wanted. It is immaterial. Before you come to the exceptions the liability of the shipowner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions, it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no negligence whatever he would be liable. It cannot be, therefore, that this irresistible inference ought to be written into that part

of the contract. It is not wanted there; therefore you must write it into that part which contains the exceptions.

When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say "perils of the sea not caused by the negligence of the captain or crew." You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, "Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner."

That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, "Yes; but the case was brought within the exception—within its ordinary meaning." That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception.

In my opinion, you find in all the books, down to the most modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and, relying on the first and substantive part of the bill of lading, alleged non-delivery. Strictly speaking, the declaration could not properly have stated anything about negligence, because negligence was immaterial.

The plea followed the terms of the exception construed in their ordinary sense—that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it

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shews that it was no part of the proof which the defendant was bound to give.

Then you have a long succession of cases, all setting out a replication, and that replication in the given case is: "Yes, it is true there was a loss by perils of the sea within the primâ facie exception; but that was brought about by the negligence of your servants—i.e., by your captain and crew." The plaintiff could not depart from his declaration; but he could support it by shewing that the exception was not satisfied, because there had been negligence.

That being the state of things, is there any case to the contrary of that constant course of pleading, and of that result of the principle of construction of a bill of lading? I know of none; but I think there are cases which distinctly shew that the course of pleading did give the right view of the different shiftings of the burden of proof. I think that the case of *Grill* v. *General Iron Screw Collier Co.* (1) is distinct on the point, and so also is the case of *Czech* v. *General Steam Navigation Co.* (2) I think that the two Scotch cases, *Craig* v. *Delargy* (3) and *Dobbie* v. *Williams* (4), are as distinct and clear to the very point as cases can be.

I therefore think that unless there is something which will justify us in setting aside the principle of conduct arising from the true construction of the contract and the universal mode of treating trials up to this time, that which is said in Mr. Carver's book (5) is correct, viz., that if the loss apparently falls within the exception, the burden of shewing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, is upon the person so contending. Mr. Carver cites the above cases in support of the proposition. Of course, the proposition in his book is not to be treated as authority; but I adopt that statement of the law, and I think it is right.

But it is said that a suggestion or a decision or an opinion of the greatest weight has been given to the contrary. That is the

(1) Law Rep. 1 C. P. 600.
(2) Law Rep. 3 C. P. 14.
(3) 16 Scotch L. R. 750.
(4) 21 Scotch L. R. 667.
(5) A Treatise on the Law relating to the Carriage of Goods by Sea, by T. G. Carver, 2nd ed. p. 89, s. 78.

opinion which is said to have been given by Lord Herschell in the case of *The Xantho*. (1) I need hardly say that I have the greatest respect and regard for the legal opinion of Lord Herschell in any mercantile case; but reading what he said in *The Xantho* (1), I think he positively declined to give an opinion. It is said that, looking through or into his words, the tendency of his mind may be seen; but that is not an opinion. The tendency of his mind when he refuses to give an opinion is not in my judgment any opinion at all. I therefore do not feel hampered by a supposed view of Lord Herschell, which I feel, if the case ever goes before him for decision, and if he had that idea passing through his mind, he will not act upon.

I think, therefore, that the law is clear that the burden of proving this negligence lies upon the plaintiff. If that be true, what is the result of this case? When the first part of the trial was over, counsel for the plaintiff proceeded to open his case. Naturally he opened with "The goods were put on board the ship," which really was not a subject of dispute, and "The goods were not delivered." That was not a subject in dispute. There he might have stopped. He had proved his primâ facie case; but, knowing that the ship had really been stranded on the rocks and the cargo destroyed, he naturally saw that there was a loss by perils of the sea in the ordinary sense of the term, and he therefore began to prepare the mind of the judge before the time. He began to open that which he would have to prove on a replication that the perils of the sea had been caused by the negligence of the defendants' servants. He might have taken that to be the real issue of the case, and then have opened the negligence which he alleged, and if he had evidence of it put in his evidence. But it is too soon: it is meeting the defendant before the defendant has made any case. He puts in the answers to the interrogatories, which immediately shew that there has been a loss by perils of the sea in the ordinary sense, and I think that shewed—though I will not pledge myself—evidence, perhaps strong evidence, that that was the result of negligent navigation. He was, however, not content, but quoted *The Xantho* (1), and endeavoured to get from the judge a ruling that the burden

(1) 12 App. Cas. 503.

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of proof which lay upon the defendants was that they must not only prove loss by perils of the sea, but must prove that that was not the result of the negligence of their captain and crew. He obtained that ruling of the judge though counsel for the defendants at that time had not said that he would make no answer. He had not said that he would not call evidence. It is after counsel for the plaintiffs has obtained that ruling of the judge which, to my mind, would increase the obligation on the defendants, and put upon them the necessity of far stronger evidence than if that ruling did not exist, that counsel for the defendants said: "After that ruling it is of no use for me to answer this specific allegation which you have made that my going out of my course and being out of my course was negligence." If the defendants had shewn that their being in Cardigan Bay was not the result of careless navigation and not keeping their course outside of Cardigan Bay, but that they had sufficient reason for going into Cardigan Bay, which would take away any real suggestion of its being carelessness to be in Cardigan Bay, that would not do. They must go on to prove that if they were in Cardigan Bay there was no negligence which conduced to the running on the rocks. It seems to me that the burden of proof thus laid upon them was greater than the law justified. In my opinion, the defendants were bound to come here in order to get that view of the Court; and they have succeeded in convincing me that the learned judge has misconstrued that which was suggested to him as the authority of Lord Herschell, and that he has given a ruling which was not according to law. I think, therefore, that as upon the point of the appeal the defendants have succeeded, they ought to have the costs of the appeal, and as the result, about which I give no opinion, is yet to be determined, I think there must be a new trial, though under the circumstances the costs of the first trial must abide the event of the second.

LOPES, L.J. The question raised on this appeal is as to the onus of proof; as a general rule, it may be said that the burden of proof lies on the person who affirms a particular thing "ei incumbit probatio qui dicit, non qui negat." (1) It appears to

(1) Digest, xxii. 3, 2.

me in this case that the burden of proving that the loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of shewing that there is something else which deprives the party of the power of relying on the excepted cause lies on the person who sets up that contention. That in this case would be the plaintiffs, who are the shippers.

I think that is not only the result of the authorities, but of all pleadings before the Judicature Acts. The cases which have been referred to are *Grill* v. *General Iron Screw Collier Co.* (1), *Czech* v. *General Steam Navigation Co.* (2), *Taylor* v. *Liverpool and Great Western Steam Co.* (3), *Peninsular and Oriental Steamship Co.* v. *Shand* (4), and *Wyld* v. *Pickford.* (5)

These cases shew what I have stated with regard to the onus of proof, namely, that where a peril of the sea is set up it is sufficient for the defendant to prove the peril relied on, and he need not go on to shew that that was really not caused by him; but if the plaintiff says that it was, then he must set it up in his replication and must prove it.

I have not heard a single case except one, which I think is not an authority at all, which in any way negatives that proposition. But it is said there is a contrary opinion expressed by Lord Herschell in the case of *The Xantho.* (6) The particular passage referred to is at page 512, and runs: "Much argument was addressed to your Lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus, and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must shew that the loss was not due to a cause induced by their own negligence. I do

(1) Law Rep. 1 C. P. 600.
(2) Law Rep. 3 C. P. 14.
(3) Law Rep. 9 Q. B. 546.
(4) 3 Moo. P. C. (N.S.) 272.
(5) 8 M. & W. 443.
(6) 12 App. Cas. 503.

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not think that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view." It is perfectly clear, therefore, that he does not intend to decide that point. He goes on to say: "I certainly must not be understood as deciding that the mere proof of loss by collision, under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate the defendants." That is the passage which is relied upon. Probably, I think, reading it strictly, it might be said that if the learned Lord had an inclination of opinion at all, it was in favour of that opinion which is put forward by the counsel for the plaintiffs; but the materiality of the whole passage is that the point is not decided at all, and is left for further decision. Therefore, to put an extra-judicial dictum of that kind against a practice which has existed for a great number of years would be most undesirable, and would be contrary to all precedent.

In the result, therefore, I come to the conclusion that the learned President was misdirecting himself. The President says: "I think Lord Herschell rather inclined to the view that the defendant has to shew, not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading, that is, a peril of the sea not occasioned by the negligence of the defendant." The learned judge so ruled, and was invited so to rule by counsel for the plaintiffs. Thereupon counsel for the defendants said he left the case as it was.

I think that is a clear misdirection by the learned judge, and such a misdirection as before the Judicature Acts would have necessitated a new trial; but under Order XXXIX., r. 6, the strictness of the practice is mitigated, and new trials are not granted unless there is some substantial wrong or miscarriage of justice. Speaking for myself, I do not hesitate to say that this part of the case has given me considerable trouble; but I am not prepared to say that a miscarriage of justice may not have occurred, for it makes all the difference where the onus of proof is held to be. I cannot, therefore, say that some injustice, or at any rate some substantial wrong, may not have been occasioned to the defendants by the erroneous action which I consider the learned judge took in regard to this case.

DAVEY, L.J. Counsel for the defendants have shewn that under the old form of pleading before the Judicature Acts negligence must either be alleged in the declaration or else be specially replied. It may be doubted whether it would require to be set out in the declaration; but in either case it was a matter which must be alleged and proved by the plaintiffs.

The forms of pleading were not a mere technicality, but were framed in the manner in which they were so as to carry out what is really a matter of substance; and, as the Master of the Rolls has explained, the burden of proof followed and shifted from time to time, according to the matters alleged in the pleading. No instance has been quoted of a plea such as that in *Phillips* v. *Clark* (1) being demurred to; but if counsel for the plaintiffs were right in saying that the burden of proof was on the defendants, then a plea merely stating one of the excepted perils which did not go on to negative any suggestion of negligence would have been insufficient.

I think the point is clearly put by Baron Parke in the case of *Wyld* v. *Pickford* (2), and seems to me to bear out exactly what has been said, as also do the subsequent cases of *Grill* v. *General Iron Screw Collier Co.* (3) and *Peninsular and Oriental Steamship Co.* v. *Shand.* (4) The judgment of Willes, J., in *Grill* v. *General Iron Screw Collier Co.* (3) appears to shew that perils of the sea are excepted, but that there is an implied contract by the shipowner that he will carry with care and caution, and his breach of that contract prevents him availing himself of the perils of the sea. *Taylor* v. *Liverpool and Great Western Steam Co.* (5), relied upon by counsel for the plaintiffs, is distinguishable, as it turned entirely upon the construction of the word "thieves" in the exception in the bill of lading, and the Court came to the conclusion that the word "thieves" meant only as a matter of construction persons outside the vessel. That being so, of course the defendant had to bring himself within the excepted perils, and if that were not one of the excepted perils properly considered by the Court, he did not bring himself

(1) 2 C. B. (N.S.) 156.
(2) 8 M. & W. 443.
(3) Law Rep. 1 C. P. 600.
(4) 3 Moo. P. C. (N.S.) 272.
(5) Law Rep. 9 Q. B. 546.

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Davey, L.J.

within the excepted perils. Therefore I think that case cannot be relied on.

I confess I have great doubt whether the defendants had anything in substance to complain of, because there was evidence raising a primâ facie case of negligence, and the learned judge might, it is admitted, have said to the counsel for the defendants, "There is a primâ facie case of negligence raised by the plaintiffs for you to answer," and the defendants would have put in their evidence in answer to that. If the learned judge had taken that course, there could not have been, so far as I can see, anything to complain of. There are some subsequent words by the counsel for the plaintiffs after the learned judge decided the point—words which warn the counsel for the defendants about the interrogatories and the evidence produced from the lighthouse; but these words were subsequent to the very clear judgment delivered by the learned President, and counsel for the defendants had announced the course which on that decision he intended to take.

It is to be further observed that the learned judge seems never to have found, as the basis of his judgment, that there was negligence in fact, but to have given judgment for the plaintiffs on the ground that it was for the defendants to negative negligence, and that they had not done so.

On consideration it seems to me difficult to say that the defendants might not be prejudiced by the way in which the case was decided, because the evidence might have been so evenly balanced that the ultimate decision might finally turn on the question on whom the burden of proof lay. On these grounds I agree with the judgment which the Master of the Rolls has given.

New trial ordered.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for defendants: *Norris, Allens, & Chapman, for J. M. Quiggin & Brothers, Liverpool.*

T. L. M.

THE ENGLISHMAN AND THE AUSTRALIA.

1894

Admiralty—Tug and Tow—Tug in Collision with third Vessel—Contributory Negligence of third Vessel—Joint Tortfeasors—Liability of Tow—Measure of Damages.

April 10, 11, 12, 13, 30; *May* 8.

A tug, whilst towing a vessel, came into collision with, and sank, a third vessel, and was herself damaged. The third vessel and the tug were found to blame for excessive speed in fog. The tow was also found to blame for not controlling the speed of the tug. On these facts:—

Held, by the President (Sir F. H. Jeune), that although the tow had not been herself in collision, and therefore her liability to the third vessel depended on the relationship of master and servant between herself and the tug, still the Admiralty rule in the case of collision between ships applied, and the owners of the tug and the owners of the tow were liable for half the damages of the third vessel after deducting half the damages of the tug for which the owners of the third vessel were liable.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Ada*, and the master and crew proceeding for their personal effects. The defendants were the owners of the steamtug *Englishman*, and the owners of the barque *Australia*.

The facts were shortly that:—

About 6.45 A.M. on February 22, 1894, the steamship *Ada* of the port of London, 555 tons register, engines of ninety-nine horse-power, and fourteen hands, from Sunderland to Devonport, with coals, was in the North Sea, between Hartlepool and Seaham, on a S.E. b. S. magnetic course, the weather being foggy, the wind light from the westward, the tide the first of the ebb of little or no force, when she came into collision with the *Englishman*, a screw steamtug belonging to Hull, of thirty-two tons net and 169 tons gross register, with nine hands, steering N.W. b. N. $\frac{3}{4}$ N. magnetic, and towing with a scope of 100 fathoms the *Australia*, a Norwegian iron barque of 1232 tons net register, from Havre to the Tyne, in ballast. The result of the collision was that the *Ada* sank, and the *Englishman* sustained damage.

The plaintiffs, by their statement of claim, alleged that the loss of the *Ada* was caused by the negligent navigation of the *Englishman* and the *Australia*, and paragraph 4 stated that "the *Englishman* at the time of the collision was under an engagement

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with the owners of the *Australia* to tow her to the Tyne, and those on board the *Englishman* were the servants of the owners of the *Australia*, and were subject to the control and orders of those on board that vessel." By their particulars of negligence the plaintiffs alleged (inter alia) that "those on board the *Australia* neglected to order the *Englishman* to stop and reverse her engines in due time, or at all, before the collision," and "ordered or permitted the *Englishman* to proceed at an improper and excessive rate of speed, and without her duly sounding her fog whistle, and neglected to give her proper orders to sound her fog whistle," and "neglected to call the attention of those on board the *Englishman* to the fog whistle of the *Ada*, or to give them proper orders in reference thereto when such fog whistle was or should have been heard."

By their defence the owners of the *Englishman* alleged that the collision was due to the negligent navigation of the *Ada*, and, by leave obtained at the trial, they counter-claimed for the damage sustained by their tug.

By their defence the owners of the *Australia* alleged (inter alia) that their barque "did not come into collision with the plaintiffs' steamship *Ada*, and caused no damage thereto"; that those on board the *Englishman* were not their servants, or subject in any matter material to the collision to the control and orders of those on board the *Australia*; that the servants of the defendants "on board the *Australia* were not guilty of any negligence causing or contributing" to the collision, and that they were not liable to the plaintiffs for the negligence (if any) of those on board the *Englishman*, "and could not, by the exercise of any care and skill on their part, have prevented the collision and the consequence of such negligence (if any)"; that the fog had become so thick that the tug was no longer visible to those on board the *Australia*, and that they had hailed the tug to shorten in the tow-rope, when the crash as of a collision was heard ahead, but neither the tug or any other vessel or their lights were visible; that the helm of the *Australia* was put hard-a-port, and as the tug ceased towing the *Australia* rapidly lost way, and presently made out the loom of the *Englishman* and of the *Ada* lying with their heads to the eastward.

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April 10, 11, 12, 13. The trial took place before the President (Sir F. H. Jeune), assisted by two of the Elder Brethren of the Trinity House, when the Court found all three vessels to blame, the *Ada* for going at about six knots an hour in a fog, the tug *Englishman* also for excessive speed, and the *Australia* for not controlling the speed of the tug. As to whistling, the learned judge said: "I do not desire to base my decision on that point; but, were it needful, I should find, on the evidence, that neither the *Englishman* nor the *Ada* whistled according to law. I do not mean to say that they did not either of them whistle at all. It may be that they did; but I think it must be the case that neither whistled according to the interval of time which the rule prescribes." As to the *Australia*, the learned judge said: "It appears to me clear that the tow had full knowledge of the speed of the tug, and that the tow could have lessened the speed of the tug had she been so minded." (1)

The question of law as to the liability of the owners of the *Australia* was reserved, and was argued on April 30 by—

Sir Walter Phillimore, and *A. E. Nelson*, for the plaintiffs, the owners of the *Ada*.

Aspinall, Q.C., and *Butler Aspinall*, for the defendants and counter-claimants, the owners of the tug *Englishman*.

Pyke, Q.C., and *T. E. Scrutton*, for the defendants, the owners of the *Australia*.

The arguments of counsel fully appear from the judgment. In addition to the cases there cited, the following were referred to. By counsel for the plaintiffs, as to the Admiralty rule of half-damages applying as between the *Ada* and the *Australia*: *The Nightwatch* (2); *The Robert Pow* (3); *The Laconia* (4); *The City of Manchester* (5); *The Hector* (6); *The Khedive*. (7)

(1) It was suggested that the tow could have checked the tug by "girting" her: see the judgment of Sir James Hannen in *The Niobe*, 13 P. D. 55, at p. 58.

(2) Lush. 542.
(3) Br. & L. 99.
(4) Br. & L. 117.
(5) 5 P. D. 3, 221.
(6) 8 P. D. 218.
(7) 7 App. Cas. 795.

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By counsel for the defendants, the owners of the *Australia*, on the question of contribution by joint tortfeasors: *Pearson* v. *Skelton* (1); *Merryweather* v. *Nixan*. (2) As to the relationship between the owners of the vessel in tow and the crew of the tug: *The Quickstep*. (3)

Cur. adv. vult.

May 8. THE PRESIDENT (SIR F. H. JEUNE). In this case the *Ada*, a steam vessel, brought an action against a tug, the *Englishman*, and her tow, a barque, the *Australia*, in respect of a collision between herself and the *Englishman*, occurring in the North Sea off Seaham. I found that both the *Ada* and the *Englishman* were to blame for their excessive speed, and that the *Australia* could and should have restrained, but did not restrain, the speed of the *Englishman*.

Several points of law are now raised on behalf of the *Australia*.

The first and main point is that the *Ada* was guilty of contributory negligence, and, therefore, cannot recover—in other words, that the rule of common law, and not the rule of Admiralty, applies. The argument, as I understand it, is that inasmuch as the collision was not between the *Ada* and the *Australia*, but between the *Ada* and the *Englishman*, and as, therefore, in order to make the *Australia* liable to the *Ada*, the principle of the liability of a master for the negligence of his servant is introduced, that this ousts the Admiralty doctrine that when in a collision two ships are to blame, the delinquent ship can recover part, fixed by Admiralty practice in this country at half the damage, and substitutes the common law doctrine that, in an action of negligence, neither of two wrongdoers can recover.

It is apparently true that the precise set of facts in this case has hitherto not arisen for adjudication, because in the two cases nearest to it there is a difference. Neither in *The Niobe* (4), where a vessel was held entitled to recover both against a tug with whom she came into collision and a tow who was held responsible for the tug, nor in *The American and The Syria* (5),

(1) 1 M. & W. 504.
(2) 8 T. R. 186.
(3) 15 P. D. 196.
(4) 13 P. D. 55.
(5) Law Rep. 6 P. C. 127.

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when, under similar circumstances of collision, a vessel was held entitled to recover against the tug alone, was the plaintiff vessel to blame. In the latter case, had the plaintiff vessel been to blame the ordinary rule of Admiralty law would no doubt have been followed.

But, although there is no authority in point, the case seems to me to be clear on principle, and indeed to be free from the difficulties which occur in several cases, similar in some respects to the present.

This is a case of a maritime tort, arising out of a collision between ships, and in which both the plaintiffs and the defendants appear in the action as the owners of ships, and in that capacity are to blame in respect of the collision.

It is a case of a maritime tort. Therefore it is a case within the Admiralty jurisdiction (see *The Sarah* (1)), and a case to which decisions given in cases of contract such as *The Energy* (2) are not applicable.

It is a case arising out of a collision between ships. Therefore, we need not concern ourselves with such extensions of the Admiralty law as appear to have been made in America. I was referred in argument to the case of *The Max Morris* (3), in which the Supreme Court of the United States held that a man who fell from the bridge to the deck partly of his own fault, partly of that of the officers of the vessel, was entitled to recover part of his damages. But it is sufficient for the present purpose to accept the limitation of the Admiralty rule to collisions between ships as suggested by Lord Herschell and Lord Macnaghten in the case of *The Zeta* (4), in the House of Lords.

It is a case where both the plaintiffs and the defendants appear in the action as owners of ships, and are both in that capacity to blame in respect of the collision. Therefore the question is not the same as in the case of *The Milan* (5), where the owners of the cargo in one ship in default brought an action against the owners of the other ship, and it was held that the defendants were liable to pay only half of the damage; and it is not necessary to

(1) Lush. 549.
(2) Law Rep. 3 A. & E. 48.
(3) 30 Davis Reports, 1.
(4) [1893] A. C. 468, at pp. 487, 491.
(5) Lush. 388.

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consider how far the authority of *The Milan* (1), recognised by the Court of Appeal in the case of the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2), was shaken by the observations made by the same Court in the subsequent case of *The Bernina* (3), nor to point out the distinction between the case of *The Milan* (1) and that of *The Bushire* (4), nor is it necessary to consider the view taken by Butt, J., in *The Vera Cruz* (5), that the Admiralty rule applies, not only in actions between ships, but in an action by the (I omit the consideration of the action in that case being by the representative of the captain) captain of one ship against the owners of the other when both ships were to blame, and thus the captain himself in fault.

The one fact which introduces a new element for consideration is that, though one of the two ships in collision was the ship of the plaintiffs, the other ship in collision was not the ship of the present defendants. But it appears to me to be immaterial when once it is established that the defendants are liable in respect of the collision, and that their liability rests on a principle forming part of the law maritime. This case is not like those of *The Vera Cruz* (6) and *The Bernina* (3), in which the House of Lords in the one case, and the Court of Appeal in the other, held that, as the action was brought under Lord Campbell's Act, they were not under the jurisdiction of the Admiralty Court, nor cases in which s. 25, sub-s. 9, of the Judicature Act of 1873 applied. It is clear from the cases of *The Sinquasi* (7) and *The Niobe* (8), that when a vessel comes into collision with a tug by reason of negligence of the tug which the tow could have prevented, the tow is liable to such vessel, and that solely by force of the law maritime. I am by no means sure that this case may not be said to fall within the principle of the tow and tug being, in contemplation of law, identified as one ship. That principle clearly applies for the purposes of the Navigation Rules (*The Cleadon* (9)), and in the case of *The Niobe* (10) it was held in

(1) Lush. 388.
(2) 10 Q. B. D. 521.
(3) 12 P. D. 58.
(4) 5 Asp. M. L. C. 416.
(5) 9 P. D. 88.
(6) 10 App. Cas. 59.
(7) 5 P. D. 241.
(8) 13 P. D. 55.
(9) Lush. 158; 14 Moo. P. C. 92.
(10) [1891] A. C. 401.

the House of Lords that the tow and tug were one ship in contemplation of law for all purposes of their joint navigation, and that that principle applied so as to make the underwriters under a policy, which in terms dealt with the insured ship coming into collision, liable in respect of a collision between her tug and another vessel. Nor does it appear to me that the decision in *The Mary* (1), nor the view taken by the Privy Council in *The American and The Syria* (2), conflict with either of these authorities. In *The Mary* (1) the tow and tug were in pari delicto, but the tow was relieved from the consequence of her fault by the presence of a pilot, an advantage which the tug could not claim.

It was indeed said in *The American and The Syria* (2) that the principle of the tug and tow being one ship did not in that case apply to make the tow liable, but that was because not only the sole motive power but also the sole control was in the tug. But, for the purposes of this case, it is sufficient to adopt the language of the Privy Council in *The American and The Syria* (2): "The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her." And inasmuch as such liability of a master for his servant is as much part of the Admiralty as of the common law, and this case, therefore, falls certainly within the principles of Admiralty jurisdiction, I cannot see why the rule of Admiralty law, that a delinquent ship in collision can recover part of her damages, is to be excluded. I will only add that in the case of *The Sisters* (3), which was referred to before me as an instance of an action in which the plaintiff and defendant ship were not in collision with each other, I think that the phrase of James, L.J., "To disentitle the *Alfreda* to her right of recovery, there must have been contributory negligence," must be understood to mean that such contributory negligence would disentitle the *Alfreda* to her right of full recovery. There is nothing to shew that the learned judge intended to suggest, much less to decide, that the *Alfreda* if negligent would have failed altogether in her action.

The second point made was that the judgment should be drawn up so as to make the *Englishman* and the *Australia* primarily

(1) 5 P. D. 14. (2) Law Rep. 6 P. C. 127.
(3) 1 P. D. 117.

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liable for a moiety of the sum recoverable with a remedy over against each in default of the other. This point seems to me to be concluded by the judgment in *The Avon and Thomas Joliffe* (1).

It is also urged that the judgment should be for the balance of the moiety of the *Ada's* damage over the moiety of the *Englishman's* damage. This was conceded by counsel on behalf of the *Ada*.

Lastly, it was suggested, but not, I think, pressed, that the tonnage of the tug limited the total liability of the tug and tow. I can see no authority in the words of the 54th section of the Merchant Shipping Act of 1862 for this contention. (2)

Solicitors for plaintiffs, the owners of the *Ada*: *Lowless & Co.*

Solicitors for defendants, the owners of the *Englishman*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants, the owners of the *Australia*: *Thomas Cooper & Co.*

(1) [1891] P. 7.

(2) By the decree dated May 8, 1894, the President pronounced the collision to have been occasioned by the fault or default of the owners, masters, and crews of the respective vessels *Englishman*, *Australia*, and *Ada*, and he condemned the owners of the steamtug *Englishman* and their bail, and the owners of the barque *Australia* and their bail, in a moiety of the plaintiffs' claim in respect of the said damage; and also condemned the owners of the steamship *Ada* and their bail in a moiety of the counterclaim of the owners of the said steamtug *Englishman* (some of the defendants), in respect of the said damage; and he referred the said damage to the registrar, assisted by merchants, to report the amount thereof, but made no order as to costs.

T. L. M.

HUNT *v.* HUNT AND COOPER. 1894 *May* 7.

Divorce—Practice—Damages—Intervention—Assignee of Petitioner's Interest in the Damages.

The petitioner in a divorce suit having recovered damages against the co-respondent, a person claiming to be the assignee of the petitioner's interest in the damages applied at chambers for leave to intervene:—

Held, that the application must be refused.

Application at chambers by Sarah Jane Hunt to be allowed to intervene in the suit, in which the petitioner had obtained a decree nisi for the dissolution of his marriage with the respondent, and the jury had awarded the petitioner 800*l.* damages against the co-respondent. The applicant claimed to be the assignee of the petitioner's interest in the damages.

R. H. Pritchard, for the applicant, admitted that there was no precedent for such an order, but submitted that she should be allowed to appear, as an incumbrancer is allowed to appear on an application for the variation of a settlement.

Barnard, for the respondent, contended that the assignment was invalid, as the damages were in the disposition of the Court. He stated that it was intended to move the Court for an order applying the damages for the benefit of the respondent.

The petitioner and the co-respondent were respectively represented by their solicitors.

THE PRESIDENT dismissed the summons.

Solicitors: *Chester & Co.; Colyer & Colyer; Turner & Co.; Rowcliffes, Rawle & Co.*

H. D. W.

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April 11, 12, 13, 14; *May* 2.

[IN THE COURT OF APPEAL.]

ALLEN *v.* ALLEN AND BELL.

Divorce—Practice—Evidence—Admission of Evidence of Respondent against co-Respondent—Right of co-Respondent to Cross-examine Respondent—Misdirection—New Trial.

The evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination.

Therefore, in a divorce suit, the evidence of the respondent is not admissible against a co-respondent if the judge refuses to allow the co-respondent to cross-examine upon it.

Semble, a right of cross-examination exists between a respondent and a co-respondent, and if cross-examination is permitted the evidence of either party is admissible against the other.

Glennie v. *Glennie* (3 Sw. & Tr. 109) doubted.

MOTION for new trial.

In this case a husband petitioned for dissolution of marriage on the ground of the wife's adultery with the co-respondent C. E. Bell and a person unknown. The case was tried before the President and a special jury in March last. The adultery relied on was alleged to have been committed at Ostend and Bruges in July and August, 1892.

The respondent went to Ostend alone, without the knowledge of the petitioner, in July, 1892, and stayed at the Hotel Fontaine, where she remained till August 7. The co-respondent, Bell, who had known the respondent before her marriage, arrived at Ostend on August 5, and stayed at the Continental Hotel till the 7th. He described himself in the Bulletin d'arrivée of the hotel as "médecin," although he was not in fact a medical man. During his stay at Ostend he spent a considerable part of his time with the respondent. The respondent, in the course of her evidence, stated that she was surprised at seeing the co-respondent at Ostend, and did not know of his coming, and she denied that she ever wrote to him to give him her address. With reference to the entry in the Bulletin d'arrivée, she said that the explanation which the co-respondent gave to her was that he

was there "on the sly," and did not wish his partner to know where he was. Counsel for the co-respondent, knowing that this evidence would not accord with the account which his client was about to give of the same matters, asked leave to cross-examine the respondent. This the President refused, saying that counsel must treat her as his witness or treat her as a hostile witness; that there was no ground for cross-examining her; that he had never known such a thing to be done. When the co-respondent was called he admitted having received a letter from the respondent in which she gave him her address at Ostend, and he stated that his object in going there was to claim repayment of a sum of 180*l.* which he had lent to the respondent three years previously. The description of himself as "médecin" he explained by saying that he had been at a dance some years ago with the respondent and had there prescribed some anti-pyrine to a lady who felt faint, and had thereupon acquired the name of "doctor," and that he so described himself in the Bulletin d'arrivée as a joke. There was no direct evidence that the co-respondent had committed adultery with the respondent. In his summing-up the President strongly contrasted the evidence of the respondent with that of the co-respondent. Referring to the evidence of what happened at Ostend, he said: "First and foremost in this case, there is a complete discrepancy between the story told by Mrs. Allen and the story told by Mr. Bell in two most important particulars There is no getting out of that." He then dealt at some length with the reasons given by the respondent and the co-respondent respectively for the visit to Ostend, and pointed out that, according to the story of the respondent, she did not know that the co-respondent was coming, and left it to be inferred that he was staying there as a casual guest, whereas the account of the co-respondent was that he went there to claim payment of a debt; and he expressly called the attention of the jury to the fact that upon this subject the respondent was in direct conflict with the co-respondent. The President then proceeded: "That brings us to another matter on which again they are absolutely in contradiction—that is, to that not unimportant entry of his directly on his arrival in the Bulletin d'arrivée of the hotel."

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The President then alluded to the reason which the co-respondent gave for describing himself as "médecin," and to the explanation of the respondent, and characterized his story as one in absolute contradiction of hers, and he concluded by saying: "The two stories are as different as can be, and you must judge for yourselves which of those two stories is true, or whether the truth is not that he went over to see her and pass a couple of days or so in her company."

The jury found that the respondent had committed adultery with the co-respondent Bell, and that the co-respondent Bell had committed adultery with the respondent. They also found that the respondent had committed adultery with a person unknown. The President granted a decree nisi and condemned the co-respondent Bell in the costs incurred on behalf of the petitioner in respect of the charges of adultery proved. The co-respondent Bell now applied that the verdict and judgment against him might be set aside, and that judgment might be entered for him upon the ground that there was no evidence upon which the jury could reasonably find that he had committed adultery with the respondent; or alternatively for a new trial, on the ground that the verdict was against the weight of evidence, and also on the ground of misdirection by the President in (inter alia) omitting to point out to the jury that some of the evidence in the case which was evidence against the respondent was not evidence against the co-respondent.

Murphy, Q.C., and *Bigham, Q.C.* (*Bargrave Deane*, with them), for the co-respondent. The evidence of the respondent was not admissible against the co-respondent, because evidence is not admissible against any party unless it is liable to be tested by cross-examination. The President was wrong in refusing to allow the respondent to be cross-examined by the co-respondent, and wrong in contrasting their evidence in his summing-up.

Sir Henry James, Q.C., and *Sir Edward Clarke, Q.C.* (*Lockwood, Q.C.*, and *Searle*, with them), for the petitioner. According to the practice in the Divorce Court, a wife who is respondent in a divorce suit may choose to say nothing; or she may admit the adultery, in which case she may be cross-examined by the co-re-

spondent; or she may deny the adultery, in which case she may be examined in chief by the co-respondent; and if she then turns hostile she may be cross-examined by him.

A confession of adultery made by the wife out of court is not evidence against the co-respondent; but if she comes into court and gives evidence, that is evidence against all parties.

Murphy, Q.C., in reply. The true principle is that nothing which is said on oath is evidence against any other person unless an opportunity is given to such other person to test the evidence by cross-examination; and it follows that the evidence of the respondent cannot be used against the co-respondent unless the co-respondent is entitled as of right to cross-examine her. A respondent can only be examined by the co-respondent if he adopts her as his own witness—*Glennie* v. *Glennie* (1)—and then, by 17 & 18 Vict. c. 125, s. 22, if she shall prove adverse, i.e., shall exhibit a hostile mind—Best on Evidence, p. 597—the co-respondent may cross-examine her if the judge thinks fit; but even then it is a matter, not of right, but of discretion: *Price* v. *Manning* (2); *Greenough* v. *Eccles.* (3) Here the respondent, in denying that she gave her address to the co-respondent, was actuated, not by any hostility to the co-respondent, but by a desire to make a better case against the petitioner, and she could not be treated as a hostile witness. The President ought, therefore, to have warned the jury that her evidence was not admissible against the co-respondent. [*Lord* v. *Colvin* (4) and *Feilden* v. *Slater* (5) were also referred to as to the admissibility of the evidence of one defendant against another.]

May 2. LOPES, L.J., delivered the judgment of the Court (Lindley, Lopes, and Kay, L.JJ.). [The Lord Justice, after alluding to the fact that there was no direct evidence of any adultery with the co-respondent Bell, continued as follows:—] It is not necessary to prove the direct fact of adultery, nor is it

(1) 32 L. J. (P. & M.) 21, n.; 3 Sw. & Tr. 109; 7 L. T. R. (N.S.) 696.
(2) 42 Ch. D. 372.
(3) 5 C. B. (N.S.) 786, 804.
(4) 3 Drew. 222.
(5) Law Rep. 7 Eq. 523, 529.

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necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden* v. *Loveden* (1)—"if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated.

[The Lord Justice then reviewed the evidence, and came to the conclusion that the verdict could not be upset on the ground that it was against the weight of evidence, and he continued as follows:—]

But a new trial is also asked for on the ground that the President misdirected the jury, and this raises a very important question with regard to the practice in the Divorce Court. [The Lord Justice then referred to the refusal of the President to allow the cross-examination of the respondent by counsel for the co-respondent, and to the summing-up so far as it contrasted the evidence of the respondent and co-respondent, and continued:—]

This appears to us to be dealing with the evidence of the respondent, which had not been subjected to cross-examination by the co-respondent, as admissible against the co-respondent, and with the evidence of the co-respondent as admissible against the respondent. Is this right? If there was a right to cross-

(1) 2 Hagg. Cons. 1, at p. 2.

examine, the admission of the evidence of the respondent and co-respondent against each other would be unobjectionable. The President held that there was no such right. It is contended that he was wrong in contrasting the evidence as he did, and that he ought to have allowed cross-examination. In our judgment he was wrong in contrasting the evidence as he did, after refusing liberty to cross-examine the respondent. It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination. In the case of prisoners jointly charged with an offence, the jury are always most carefully warned that what one may say inculpating the other is not evidence against that other. The reason is because one prisoner cannot cross-examine another, and, therefore, their statements condemnatory of each other, unassailable by cross-examination, would be valueless. But when two prisoners are jointly indicted, and a witness called by one of them gives evidence criminatory of the other, the latter has a right by himself or his counsel to cross-examine that witness: *Reg.* v. *Burditt.* (1) In refusing liberty to the co-respondent to cross-examine the respondent the President has acted on the authority of the case of *Glennie* v. *Glennie* (2), decided by Sir C. Cresswell in 1863. The learned judge in that case held that the counsel for the co-respondent could not examine a witness called for the respondent without adopting her as his own witness, and said: "You clearly cannot cross-examine her. If so, how can you examine her in chief, unless she is your witness"? The witness was then examined as the witness of the co-respondent. Any judgment of Sir C. Cresswell must carry great weight; but this case was decided in the infancy of the present Divorce Court, and before any large experience had been acquired of the practice and procedure applicable to it. The case, moreover, is not satisfactorily reported. So much as relates to the practice in question is reported in a note to the case, and it does not appear that any arguments were addressed to the learned judge; nor does the

(1) 6 Cox C. C. 458.

(2) 3 Sw. & Tr. 109.

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learned judge assign any reasons for the conclusion at which he had arrived. The case is also reported in a note only in the *Law Journal* and *Law Times*. In the Courts of Common Law, in the case of co-defendants, one co-defendant would have a right to cross-examine another co-defendant called as a witness, and the evidence of one would be evidence against the other. In the case of *Lord* v. *Colvin* (1) it was held that a defendant might cross-examine another defendant's witnesses. The Vice-Chancellor in that case consulted the whole of the judges, and said, "The opinion of the whole of the judges is that a defendant may cross-examine a co-defendant's witness." If a defendant may cross-examine his co-defendant's witnesses, à fortiori, he may cross-examine his co-defendant, if he gives evidence. If it is objected that there is no issue between a respondent and a co-respondent, the answer is that in most cases there is no issue between co-defendants, but still the right to cross-examine exists. In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross-examine, and we are at a loss to see why there should be any deviation from that rule in the Divorce Court. It is important to consider the state of the law of evidence when *Glennie* v. *Glennie* (2) was decided. The Evidence Acts of 1851 and 1853 excluded from their operation the parties to any proceedings instituted in consequence of adultery. In 1863, when *Glennie* v. *Glennie* (2) was decided, doubts were entertained as to how far the competency of witnesses in cases of adultery had been recognised in the Divorce and Matrimonial Causes Act, 1857, which founded the new Divorce Court. In 1869 an Act (32 & 33 Vict. c. 68) for the further amendment of the law of evidence was passed, which rendered parties to proceedings instituted in consequence of adultery competent witnesses, subject to a proviso that they were not liable to be asked, or bound to answer, any question tending to shew that they had been guilty of adultery, unless they had in the same proceedings given evidence in disproof of it. We understand this to mean that a party tendering himself or herself as a witness for the purpose of

(1) 3 Drew. 222.

(2) 3 Sw. & Tr. 109.

disproving an act of adultery is not protected from being cross-examined as to other acts of adultery, if these last be charged in the proceedings: *Brown* v. *Brown and Paget.* (1) The evidence with regard to the adultery is not rendered inadmissible, but protection is afforded to the witness from being questioned on the subject if the witness claims protection; but it is for the witness, and the witness only, to make the claim: *Hebblethwaite* v. *Hebblethwaite.* (2) Subject to this proviso, we should have thought that the competency of parties to proceedings instituted in consequence of adultery was absolute, and that, in respect of examination and cross-examination, and in all other respects, they were in the same predicament as other witnesses. Whatever may have been the grounds for the decision of *Glennie* v. *Glennie* (3) at the time it was decided, we entertain grave doubts if it can be supported, and whether any practice in accordance with it can be maintained, after the Evidence Amendment Act, 1869. It is, however, unnecessary in the present case to express a concluded opinion on this point, because we are clearly of opinion that if the judge refuses to allow a co-respondent to cross-examine the respondent, as he did in this case, the jury should be distinctly directed to disregard the respondent's evidence when considering the case of the co-respondent. Instead of this, the President in this case contrasted her evidence with his, and the jury would naturally be influenced by such contrast, and the influence would be distinctly prejudicial to the co-respondent. Rule 6 of Order XXXIX. of the Rules of the Supreme Court, provides that a new trial is not to be granted on the ground of misdirection unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been occasioned thereby in the trial. This rule is not applicable to the Divorce Court, and if it was we should not be prepared to say, having regard to the nature of the case made against the co-respondent, and for the reasons above given, that the effect of the misdirection complained of did not cause a substantial wrong. There were other misdirections relied upon, to which, as we should not be prepared to grant a new trial in respect of them, it is

(1) Law Rep. 3 P. & D. 198. (2) Law Rep. 2 P. & D. 29.
(3) 3 Sw. & Tr. 109.

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unnecessary to refer. There must be a new trial. The appellant will have the costs of this appeal. As the co-respondent laid himself open to so much reasonable suspicion in the Court below, he ought not to have the costs of the first trial even if he succeeds in the second. The costs of the new trial will abide the event.

Order for new trial.

Solicitors: *Tarry, Sherlock, & King; J. B. Roberts.*

G. I. F. C.

1894 *April* 26.

[IN THE CONSISTORY COURT OF LONDON.]

THE VICAR AND CHURCHWARDENS OF ST. JAMES NORLAND *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—Discretion—Faculty for Chancel Screen Gates granted on ground of Utility.

A faculty for the erection of chancel screen gates in a parish church was granted by the Consistory Court of London, on that Court being satisfied in its discretion that the erection would be of utility.

THIS was a cause of faculty, instituted on behalf of the vicar and churchwardens of the parish church of St. James Norland, Notting Hill, in the diocese of London, for the purpose of obtaining a faculty to authorize certain works for the extension of the chancel of the said church, and the erection therein of a chancel screen of iron-work, with gates attached to it; the design and dimensions of the screen and gates being shewn on a plan lodged in the registry.

The case now coming on to be heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.), the vicar of the parish of St. James Norland, one of the petitioners, moved for the faculty in person.

Oral evidence in support of the petition was given by him and by one of the churchwardens of the parish. The portion of their evidence relating to the proposed chancel screen and the gates thereto was in substance as follows: The chancel screen and gates would, if erected in the church, be of utility, and the necessity for their erection is clear. It is requisite that the organ, the music books used by the organist and the choir, and

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the other property in the chancel, should be kept secure and preserved from injury. The church is opened daily on week-days for private prayer, and persons resort there for that purpose, and if the proposed chancel screen and gates are allowed to be placed in the church, and are closed and locked at times when the church is so opened for private prayer, the needful protection would be afforded to the chancel, and it would be unnecessary to keep an attendant in the church to safeguard the contents of the chancel. The proposed erection of the screen and the gates has been approved of by the vestry of the parish.

DR. TRISTRAM. In this case the Court is asked to sanction by faculty certain improvements which it is proposed to make in the parish church of St. James Norland, the costs of which will be defrayed by Mrs. Daniel McConnell, as a memorial to her late husband. One of the proposed improvements is the erection of a chancel screen with gates, to be closed and locked when the church is open on week-days for private prayer. To the erection of the chancel screen, without the gates, no possible objection can be taken. The question for the determination of the Court is whether in this case it would be justified in sanctioning chancel gates? This, in my judgment, will depend upon whether or not they will be of utility. If it can be shewn that they will be of utility, I think the Court ought to sanction them. There have been several decisions as to the admissibility of chancel gates. The first one was given in 1855, in *Beal* v. *Liddell.* (1) In that case the church of St. Barnabas, Pimlico, having been consecrated with a chancel screen with gates attached to it, an application was made to this Court to order the removal of the gates. Dr. Lushington refused to order their removal, on the ground that they were not prohibited by Ecclesiastical Law; but he added, that he should not advise a bishop to consecrate a church with chancel gates, as he considered such a separation of the chancel from the body of the church objectionable. The reason there assigned for having the gates in the church was that they might be closed for the protection of valuable ornaments and furniture in the chancel so as

(1) Moore's Special Report, at p. 77.

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to enable it to be left open during a great part of the day, and Dr. Lushington expressed himself dissatisfied with that reason.

The next cases in point were *In re St. Augustine, Haggerstone*, heard by me in this Court (1), and that of the *Vicar of the Annunciation, Chislehurst* v. *The Parishioners of the Same*, heard also by me in the Commissary Court of Canterbury (2)—in which I held that gates to chancel screens being neither illegal nor imperative, the question whether they should be allowed was in the discretion of the Ordinary, and there being no satisfactory reason shewn for departing from the general rule laid down by Dr. Lushington, I disallowed them.

The next case, *Bradford* v. *Fry* (3), was in the Arches, on appeal from the Consistory Court of Rochester, in which the above cases were cited, and there appearing to have been no special grounds assigned for the addition of the gates, Lord Penzance disallowed them, approving of the reasons given by Dr. Lushington. Subsequently, in the case of *Re The Church of St. John, Isle of Dogs*, in this Court (4), on my being satisfied that chancel screen gates would be of practical use in protecting the music and other books and property in the chancel of the church kept open during the week for private devotion—I allowed them.

Where an ornament is not prohibited by law and it is a question for the discretion of the ecclesiastical judge in each particular case whether or not it shall be allowed; if it is shewn that it may be of practical utility in the conduct of the services of the church—or for the protection of church property when the church is open to the public; then it is within his jurisdiction to sanction its introduction. It was on this principle that the Judicial Committee, overruling the decision of the Arches in *Faulkner* v. *Litchfield* (5)—held that a credence table might be lawfully placed in a church—as subsidiary to the administration of the holy communion: *Liddell* v. *Westerton; Liddell* v. *Beal* (6).

"Faculties," says Sir John Nicholl, "are to be granted at the

(1) 4 P. D. 111.
(2) 4 P. D. 114.
(3) 4 P. D. 93.
(4) Tristram's Consistory Judgments, 67.
(5) 1 Robert; 184.
(6) Moore's Special Report, at p. 187.

discretion of the Ordinary, but it must be a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned; if an unsound discretion be exercised a party may appeal to a superior tribunal": *Butt* v. *Jones*. (1) Until recent times gates to chancel screens could serve no useful purpose, and might be supposed to have been introduced in order to indicate that there was a marked difference between the chancel and body of the church, such as is not recognized by Ecclesiastical Law. The latter was the state of things, within my own recollection, when Dr. Lushington delivered his judgment in *Beal* v. *Liddell* (2) thirty-nine years ago. Since then, owing to the increased population in this country, coupled with the crowded dwellings of the poor—a commendable practice has in many parishes been introduced of keeping the churches open during the day to enable parishioners to resort to them for private prayer; and by the introduction of chancel gates—for the protection of the choir books and other church ornaments in the chancel—the expense of having a caretaker present throughout the day in charge of the church is saved.

It is in consequence of this change in times and circumstances, that it has been my practice of late to sanction chancel gates whenever upon the evidence I am satisfied that they will be of utility in protecting the property in the chancel, and in so doing I am in no way departing from the principle of the decisions of Dr. Lushington and Lord Penzance, and I am giving effect to the rule laid down by Sir John Nicholl for the guidance of the Ordinary in such cases.

The Court is satisfied upon the evidence before it that gates to the chancel screen proposed to be erected in this church will be of such utility, and it therefore decrees a faculty authorizing all the proposed alterations—including the introduction of the chancel gates. (3)

(1) 2 Hagg. Ecc. 424.

(2) Moore's Special Report, at p. 77.

(3) As to the practice with respect to chancel screen gates in the dioceses of Chester and St. Albans: see *In re St. Agnes, Toxteth Park* (11 P. D. 1), and *The Rector and Churchwardens of St. Andrew, Romford* v. *All Persons having Interest, &c.*, ante, at p. 220.

C. F. J.

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June 11, 25.

In the Goods of BRIESEMANN.

Probate—Foreign Will—Persons appointed to realize Property in England on behalf of Foreign Executors—Law of Country of Domicil—Form of Grant.

Followed. *In the Goods of* KAUFMAN [1952] P. 325

A person domiciled in Germany made a will appointing persons in England to realize his property in England, and pay over the proceeds to his executors in Germany. The Court made a grant to these persons of administration for the use and benefit of the executors in Germany, on the ground that such grant would enable them to perform in England the duties imposed on them, according to German law, by the instrument appointing them.

Franz Briesemann, a naturalized German subject domiciled in the Grand Duchy of Mecklenburg-Schwerin, duly made a will, of clauses 9 and 10 of which the following is a translation :—

"Clause 9 : As executors of my will, two business persons shall be appointed. I request the provincial Court to appoint these testamentary executors. These testamentary executors shall have the rights and position of an unlimited general attorney of the heirs, and holding a power irrevocable by the latter."

"Clause 10 : My estate in England has to be wound up by Herbert Rolles and James Hawes. These two persons have to sell and to realize all the property which I possess in England, and to hand over the proceeds to the trustees or testamentary executors. I give to both the power to sell all the moveable and immoveable property existing in England, to collect the same, to acknowledge the receipt and payment thereof, to collect claims, to pay debts, in general to undertake for the heirs all legal matters with binding power to the heirs. As an honorarium each of the two shall receive one hundred guineas in case they shall have acted. If for the winding up of my legal matters in England legal assistance be required, James Hawes shall be appointed to that office. In order to carry out the English legal matters, I lay particular stress on the necessity that the power of representation shall be given only to James Hawes personally, not to his heirs or rightful successors."

Executors had been appointed by the provincial Court of the Grand Duchy. The English estate consisted of personal property of the value of about 20,000*l*.

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Dr. Cruesmann, a German advocate, had written the following opinion: "I have read the official copy of the will, and in doing so have had special regard to clauses 9 and 10 thereof, and I say that according to the law of Mecklenburg-Schwerin, of which, as I am informed and believe, the deceased was a domiciled subject, such an appointment as is contained in clause 10 would constitute the persons so appointed executors, and the competent German Court of the district in which the deceased resided would appoint them as such for the purpose of realizing property in Germany and transmitting the same to another country under the provisions of the will."

R. H. Pritchard, for the persons in England named in the will, contended that they were executors according to the tenor. [He referred to *In the Goods of Brown* (1), *In the Goods of Earl* (2), *Bloxam* v. *Favre* (3), and *Velho* v. *Leite*. (4)]

Cur. adv. vult.

June 25. THE PRESIDENT. In this case the deceased was domiciled in Germany. His will provided as follows: [The learned President read clauses 9 and 10.] It will be observed that the persons named in clause 10 have no power of distribution, and the devolution of authority from one of the persons named to his successors is expressly excluded. The question is, should the persons named in clause 10 be appointed executors according to the tenor, or in what other form should a grant be made to them?

The principle on which grants should be made by the Courts of this country in respect of persons domiciled in foreign countries appears to me to be settled by the case of *In the Goods of Earl*. (2) That principle I take to be, that regard should be had to the law of the domicil, in order to determine what power or authority has been vested in any one with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed on him.

(1) 2 P. D. 110.
(2) Law Rep. 1 P. & D. 450.
(3) 8 P. D. 101.
(4) 3 Sw. & Tr. 456.

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IN THE GOODS OF BRIESEMANN.

The President.

In this case Dr. Cruesmann, an expert in the law of the domicil, that is to say, the law of Mecklenburg-Schwerin, says: [The learned President read the opinion.] Although the word "executors" is employed by the German lawyer, it is clear that the powers which he attributes to the persons to whom he so refers fall short of the powers of executors according to English law.

It appears to me, therefore, that such a grant should be made to the persons in question as will enable them to perform such duties as we gather from what we are told by a competent German lawyer the Court of the domicil will expect from them, and that this will be a grant to the persons entitled to administer the estate in England, according to the law of the domicil, of administration for the use and benefit of the testamentary executors named in the will. To appoint them executors according to the tenor would, I think, be to give them powers in excess of those which the will, as construed by the Court of the domicil, intended that they should have.

Solicitors for the applicants: *Kearsey, Hawes, & Walsh.*

H. D. W.

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July 16, 24.

WIELAND AND ANOTHER *v.* BIRD.

Probate—Probate Action—Administrator Pendente Lite—Duration of Functions.

The functions of an administrator pendente lite terminate with a decree pronouncing in favour of a will with executors.

Semble, that the case is the same if there be no executors.

APPLICATION at chambers by the administrators pendente lite for directions. The Court pronounced in favour of the will propounded by the plaintiffs as executors on June 25, 1894. The question was whether the functions of the applicants ended with the decree, or continued till a grant of probate should be obtained.

Bargrave Deane, and *Barnard*, for the applicants.

Cur. adv. vult.

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July 24. THE PRESIDENT. The question is whether the functions of an administrator pendente lite terminate with a decree pronouncing in favour of a will with executors, or continue till the executors obtain a grant of probate. After considering the matter and inquiring into the practice as to such matters in the registry, I think that the lis terminates with the decree. After that, the position is the same as if there never had been a lis, and as if a testator had died leaving an undisputed will with executors. To this state of things the ordinary law applies.

I do not think that the case is altered if there be no executors. It is true that in that case the estate vests in the Court. But if a dispute arises, and an administrator pendente lite is appointed, I think his functions terminate when the dispute ends, though, after this, the estate may still be in the Court, subject to the right of the person entitled to administration to apply for it.

I do not think that the case of *Taylor* v. *Taylor* (1) affects this question. The point in that case was not whether the lis terminated with the decree of the Court, but whether the powers of the administrator continued during the appeal.

It may be added that, although the functions of the administrator pendente lite terminate with the termination of the lis, he may in some cases be right in retaining moneys received by him as administrator until his accounts are brought in and passed.

Solicitors: *Styer; Treadwell.*

(1) 6 P. D. 29.

H. D. W.

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June 11, 25.

IN THE GOODS OF KINCHELLA.

Administration — Grant to Representative of Next of Kin — Necessity for Citation of person entitled in Distribution — Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

Under s. 73 of the Probate Act, 1857, a grant of administration may be made to the representative of the next of kin of an intestate without citing a person entitled in distribution.

ANNE KINCHELLA died intestate, a widow, in 1873, leaving two daughters and a grandson entitled in distribution. The estate consisted of a share of the value of about 45*l.* in a fund in Court in the Chancery Division. The daughters were dead, one of them intestate; the grandson had not been heard of since 1875, when he was known to have gone to Australia. Caroline Augusta Gore, the daughter and executrix of Mary Gore, daughter of the intestate, applied for a grant of administration without citing the grandson.

Priestley, in support of the application, referred to *In the Goods of Mary Carr* (1), *Savage* v. *Blythe* (2), and Williams on Executors, 9th ed. 374, 375.]

Cur. adv. vult.

June 25. THE PRESIDENT. The question in this case is whether, as a matter of practice, the grant of administration should be made under the 73rd section or not.

The point is whether a person entitled in distribution must be cleared off, before making a grant to the representative of the next of kin. I have inquired as to the practice at the registry, and I am informed that it has been the invariable practice to require that a person entitled in distribution should be cleared off in such case, or that a special order of the Court should be obtained.

The case of *Ann Middleton* (3), decided in 1828, appears to me to shew that a citation to the persons entitled in distribution

(1) 1 P. & D. 291. (2) 2 Hagg. Ecc. Appendix 150.
(3) 2 Hagg. Ecc. 60.

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may in a particular instance be dispensed with by the Court, but to shew also that the general practice then was to require a person directly entitled in distribution to be cited before making the grant to the representatives of the next of kin. The word "preferred" was probably employed in that case to draw a distinction between the prior right to a grant, according to the practice of the Court in the exercise of its discretion, and the prior right of a next of kin derived from statute.

I think that, following that case, the grant might perhaps be made by the Court independently of the 73rd section; but, as no question can arise as to the power of the Court under that section, it will be better to have recourse to it.

Solicitor: *Homewood.*

H. D. W.

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June 18, 25.

Admiralty—Practice—Tender—Amount paid into Court exceeding Amount found due—Order XXII., *rr.* 1–5.

In an action of damage by collision the defendants admitted their liability, and agreed to pay a certain percentage of the plaintiffs' proved, or agreed, damages and taxed costs. The parties being unable to agree as to the amount of the damages, the question was, by consent, referred to the registrar and merchants. Before the hearing of the reference the defendants tendered and paid into court 750*l.* in satisfaction of the claim. The plaintiffs did not accept the amount tendered, and the reference proceeded. The registrar, by his report, found that, at the agreed percentage, the sum due from the defendants was 713*l.* 16*s.*, with interest at 4 per cent. to the date of tender.

The plaintiffs applied under Order XXII., r. 5, of the Rules of the Supreme Court for payment out to them of the amount tendered, viz., 750*l.*:—

Held, by Bruce, J., that the plaintiffs were only entitled to the amount found due, viz., 713*l.* 16*s.*, with interest, as—except the rules expressly dealing with the mode of payment of money into and out of court in Admiralty actions—the provisions of Order XXII. do not affect the Admiralty practice relating to tender.

SUMMONS (adjourned into court) by plaintiffs for payment out to them of 750*l.* tendered in satisfaction, and paid into court by the defendants, in an action of damage by collision, after admission of liability, but before the hearing of the reference, in which 713*l.* 16*s.*, with interest at 4 per cent., up to the date of tender, was found by the registrar to be due from the defendants to the plaintiffs by way of damages.

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The plaintiffs were Phillips and Graves, and others, owners of the dumb barge *Stockholm*, and of her cargo; the defendants were the owners of the steamship *Mona*.

F. Laing, for the plaintiffs, in support of the summons.

Butler Aspinall, for the defendants.

The facts and arguments fully appear from the judgment. In addition to the cases there mentioned the following were referred to. By counsel for the plaintiffs:—as to the practice regulating tender in the Queen's Bench Division: *Wheeler* v. *United Telephone Co.* (1); *Hennell* v. *Davies* (2); *Dunn* v. *Devon, &c., Newspaper Co.* (3) As to the Admiralty practice—Williams and Bruce's Admiralty Practice, 1st ed., p. 257. By counsel for the defendants—as to an Admiralty reference being in the nature of fresh litigation: *The Consett.* (4)

Cur. adv. vult.

June 25. BRUCE, J. This is an action of damage in which the parties on January 8, 1894, by an agreement filed in court, settled the action on the terms that the defendants should pay to the plaintiffs 67½ per cent. of the proved, or agreed, damages and their taxed costs of action. The parties were unable to agree upon the amount of damages and, by consent, the question of the amount of the damages was referred to the registrar and merchants upon the basis of the agreement. After the making of this agreement, and prior to the reference, which was held on May 24, the defendants filed notices of tender of sums of money amounting in all to 750*l.*, and lodged the money with the Paymaster-General. The notices of tender expressed the sums to be tenders in court in satisfaction of plaintiffs' claim. The registrar and merchants on the reference found that, in accordance with the terms of the agreement of settlement, there was due to the plaintiffs in respect of their claim the sum of 713*l.* 16*s.* and interest.

The amount lodged in court is more than sufficient to satisfy the amount found to be due to the plaintiffs, together with interest thereon, but notwithstanding, the plaintiffs claim to be

(1) 13 Q. B. D. 597.
(2) [1893] 1 Q. B. 367.
(3) 10 Times L. R. 335.
(4) 5 P. D. 77.

entitled to the whole amount lodged in court, and have applied to me to direct that it should be paid out to them. The plaintiffs contend that the tender in court amounts to an admission by the defendants that the amount tendered is due. The defendants contend that the tender was nothing more than an offer, and that, when the offer was not accepted, they were at liberty to establish if they could that a smaller sum was due. They ask that the balance remaining, after satisfying the amount found to be due, should be paid to them.

The argument of the plaintiffs' counsel was based mainly upon Order XXII. of the Rules of the Supreme Court, and the main question for consideration is whether rules 1 and 5 of that order govern the practice of tender by act in court in the Admiralty Division, in cases where the liability has been admitted prior to the tender, and the only question pending is, as to the amount of the damages to be fixed by the registrar. Rule 1 in Order XXII. provides that a defendant in actions to recover a debt or damages may, before or at the time of delivering his defence, or at any later time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action, or he may, with a defence denying liability, pay money into court which shall be subject to the provisions of rule 6.

It seems to me to be doubtful whether this rule applies to salvage actions, which do not, I think, come under the category of actions brought to recover a debt or damages, and if it does not apply to one large class of actions in the Admiralty Division, it may be open to contend that it was not intended to apply to other actions in the Admiralty Division. But it is sufficient for the present purpose to observe that the provisions of this rule, when read in connection with rule 2, seem to be applicable to actions where the claim or cause of action in respect of which the money is paid in, is admitted or denied by the defence. It does not seem to contemplate a payment into court in an Admiralty action after the question of liability has been determined by agreement between the parties, and the question of the amount of damages has been referred.

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Bruce, J.

The same may be said of rule 5, which provides for the case when payment into court is made with a defence setting up a tender of the sum paid. That, I think, clearly applies to a tender before action, as understood in the Common Law Courts. The defence of tender at common law was highly technical and did not apply to an action for unliquidated damages. If the debt or duty was of such a nature as to be discharged by a tender and refusal, the plea of tender was a plea in bar, but in other cases it was necessary in pleading tender to plead uncore prist—that is, to allege that the defendant was still ready and willing to pay, and so the plea amounted to an admission that the amount tendered was due, and the plaintiff was entitled to the amount tendered, though a verdict should be found against him. See Bacon's Abridgment, "Tender."

The long-established practice in the Admiralty Court was altogether different from the rules which regulate tender at common law, and I do not think that it can be gathered from any reasonable construction of the provisions of Order XXII., that it was intended to abrogate the old practice which prevailed in Admiralty actions.

According to the old practice in Admiralty, a tender was nothing more than an offer. If the offer was accepted there was an end of the action, and if it was not accepted, the fact that a tender had been made was a circumstance to be taken into consideration by the Court in the exercise of its discretion in awarding costs. It seems, according to the old practice, that tenders were often made informally out of court, but disputes arising in many cases as to whether alleged tenders had really been made or not, the Court, in order to prevent this inconvenience, required the tender to be made by act in court, and the money tendered to be brought into court, so that no doubt could arise as to the fact of tender or the amount of the tender: see per Lord Stowell: *The Vrouw Margaretha* (1); and where a tender was made by act in court it was usual for the Court to name a day on or before which the plaintiffs should declare whether they accepted or rejected the tender. In *The General Palmer* (2) Sir Christopher Robinson said that in future cases he should

(1) 4 C. Rob. 103, at p. 106. (2) 2 Hagg. 176, at p. 180.

hold neither the Court nor the owners bound in any manner by a tender not accepted in due time, and the learned reporter, in the marginal note to the case, interprets the words of the judge to mean that a tender, not accepted in due time, may be reduced by the Court. In *The Johannes* (1) a tender of fifteen guineas had been made by the defendants to the plaintiffs in a salvage suit. Sir John Nicholl pronounced against the claim, and directed the amount tendered in court to be paid out, *not* to the plaintiffs, but to the defendants to go pro tanto in payment of their costs.

I cannot find any case in which it has been held that a tender made in an Admiralty action, not accepted by the plaintiffs, has been held to operate as a binding admission of the amount due. In Coote's Admiralty Practice, at p. 37 of the edition of 1860, it is stated: "If the tender be rejected, the suit is prosecuted to a judicial conclusion. The money remains idle in the hands of the registrar until the end of the suit, when, after certain formalities, it is delivered over to the defendant who has paid it in, or to the plaintiff to whom it is awarded."

I cannot think that it was intended by Order XXII. to alter the old practice in Admiralty actions respecting tender, or to assimilate it to the technical rules regulating tender at common law. With regard to the proceedings after admission of liability in the Admiralty Registry, I may observe that, although Order LVI. lays down rules to regulate the procedure in such cases, there are not among such rules any relating to a tender in a reference, and that, I think, affords some ground for holding that tenders in such references were intended to be left to be regulated by the old practice.

Order XXII., no doubt, provides the manner in which the money tendered is to be lodged in court, but rule 20 enacts an express provision with respect to the payment of money out of court in an Admiralty action; and, in the absence of any express rule regulating in other respects the practice of tender in court in an Admiralty action, I think it is reasonable to conclude that it was intended, in accordance with the provisions of Order LXXII., r. 2, that the old procedure and practice of

(1) 6 Notes of Cases, 288.

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tender in Admiralty actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in court.

The matter seems, however, to be concluded by authority. I do not rely upon the case of *The Dunbeth* (1), which was referred to in the argument, because the order made by Gorell Barnes, J., in that case was made by consent. But the case of *The R. W. Boyd* (2) seems to be on all-fours with the present case. It was a case of damage. There was an admission of liability by the defendants, and afterwards notice of tender by the defendants of 125*l.* The plaintiffs took out a summons for payment out to them of the amount of the tender. Butt, J., however, adhering to the old practice, rejected the application, and the registrar, on the reference, having found that the sum of 120*l.* 13*s.* was due, that learned judge, on July 13, 1886, ordered that the 125*l.* should be paid out to the plaintiffs' solicitors only on the terms of their undertaking to pay the balance to the solicitors of the defendant. That is a decision, I think, binding upon me, and I therefore make no order in this case. (3)

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*

Solicitor for defendants: *Charles E. Harvey.*

(1) 1892 H. No. 860, fol. 123, a damage case.

(2) 1886 A. No. 27, fol. 5.

(3) The plaintiffs' application for payment out of the 750*l.* was rejected, and an order made for payment out to them of 728*l.* 10*s.* 1*d.*, being the amount with interest reported by the registrar to be due to the plaintiffs. The report of the registrar was, on the application of the defendants, confirmed, and 21*l.* 9*s.* 11*d.*, the balance of the tender, ordered to be paid out to them.

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Admiralty—Maritime Lien—Liabilities incurred by Master—Bill of Exchange—Priorities—Mortgagees—Merchant Shipping Act, 1889 (52 & 53 *Vict.* c. 46), *s.* 1.

By s. 1 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46): "Every master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages . . ."

The defendants, shipowners in London, contracted with a coal merchant for the supply of bunker coal to their vessel, then lying in the port of London, and about to sail on a voyage to the Mediterranean. As part of the contract payment was to be made by bill of exchange drawn by the master on the defendants in favour of the coal merchant. The bill so drawn by the master was accepted by the defendants, but dishonoured at maturity; and thereupon the master, as plaintiff, issued a writ in rem, and arrested the vessel, claiming the amount of the bill, notarial charges, interest, and the costs of the action against him as drawer. The defendants did not appear, but on the intervention of prior mortgagees of the vessel:—

Held, by the President (Sir F. H. Jeune), first, that by the Act of 1889 a lien is conferred in respect of those disbursements only in the case of which it was supposed to have been created by the Admiralty Court Act of 1861. Secondly, that the test of the disbursements or liabilities of the master, in respect of which a lien is given by the Act of 1889, is whether they are such as would, without express authority, have pledged the owners' credit. Thirdly, that in the above view there was no lien created to the prejudice of the interveners and they were therefore entitled to judgment.

Action in rem by Edmund Elliott, master of the steamship *Orienta*, for alleged liabilities incurred by him on account of the ship. The defendants were the Orienta Steam Yachting Association, Limited, the owners of the *Orienta*; the interveners were the Yorkshire Trust, Limited, and the Securities Insurance Company, Limited.

By registered mortgages, dated respectively May 5 and July 18, 1893, to secure advances, to the then owners, of 7150*l.* and 1110*l.*, the interveners became first and second mortgagees of the steamship *La Plata*. In November the defendants purchased the vessel, subject to the mortgages, changed her name to the *Orienta*, and, having entered into an agreement with Henry Gaze & Sons as to the passenger arrangements, advertised the

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vessel to sail on a sixty days' yachting cruise to the Mediterranean. To supply the vessel with bunker coal, the defendants, in January, 1894, ordered 1215 tons of Phillips & Walton, of Newcastle.

The coal was sent round to London by steamer, was discharged into lighters by Lambert Brothers, and, in pursuance of the contract with the coal merchants (the material terms of which are set out in the judgment), the master, on February 6, by way of payment of the sum of 1336*l.*, the net price of the coal at 22*s.* per ton, attended at the registered office of the defendants in London, and drew two bills of exchange on the defendants for 668*l.* and 668*l.* respectively in favour of Phillips & Walton.

After 400 tons of these coals had been placed on board the *Orienta* in the East India Docks, she had to be moved on account of her draught of water into the Victoria Docks, where 448 more tons were shipped. It was then discovered that the reserve bunker was partly filled with ballast, and the remaining 367 tons were sold to Lambert Brothers at 15*s.* 6*d.* per ton, and the amount, 284*l.* 8*s.* 6*d.*, subsequently settled in account with Henry Gaze & Sons on behalf of the defendants.

On February 14 the vessel sailed. On February 21 the first bill fell due, and was met by the defendants. On April 16 the vessel returned to London. On April 28 the second bill fell due, but was dishonoured by the defendants. On May 24 the writ in the present action was issued and the *Orienta* arrested, and as her owners, the defendants, did not appear, the first and second mortgagees intervened, gave bail for 850*l.*, and obtained the release of the vessel.

By his statement of claim, the plaintiff alleged that he was a master mariner, and whilst serving as master of the *Orienta*, incurred liabilities on the defendants' behalf for "bunker coals supplied to and necessary for the use of the said ship," for which he drew the bill of exchange dishonoured by the defendants; that an action had been commenced by the holders of the bill against him as drawer, and that he had "become liable to pay the amount of the said bill," and he claimed 668*l.*, with interest at 5 per cent., and 17*s.* 6*d.* notarial charges, together with the costs of the action against him.

The substantial portion of the defence of the interveners was as follows: "The said liabilities were not incurred and the said bill of exchange was not drawn by the plaintiff acting bonâ fide as master and on account of the said ship and in the ordinary course of his duty as such master; but the said liabilities were incurred, and the said bill of exchange was drawn . . . for the purpose of attempting to give the suppliers of the said coals a lien on the said vessel through the plaintiff to the prejudice of the interveners . . . The said coals were supplied . . . on the sole credit of the defendants the owners of the ship at the home port of the vessel, and not in the course of any voyage, and the plaintiff's part in the transaction with reference to the supply thereof and the drawing of the said bill was merely colorable, and the plaintiff is not, and the suppliers of the said coals (for whose benefit this action is being brought) are not through the plaintiff entitled to be satisfied in respect of the premises out of the said ship to the prejudice of the interveners."

Aspinall, Q.C., and *Dawson Miller*, for the plaintiff, relied upon the terms of the Merchant Shipping Act, 1889. (1)

Sir Walter Phillimore, and *F. Laing*, for the interveners.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned the following were cited. By counsel for the plaintiff—as to a claim against the owner in London for money advanced for necessaries for the use of the ship to the master in England: *Robinson* v. *Lyall.* (2) By counsel for the interveners—as to the grounds on which the master's authority to pledge his owner's credit is based: *Arthur* v. *Barton.* (3) As to what rights a master has in respect of disbursements as against a mortgagee: *The Mary Ann.* (4)

Cur. adv. vult.

(1) Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), s. 1: "Every master of a ship . . . shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages. . . ."

(2) 7 Price, 592.

(3) 6 M. & W. 138.

(4) Law Rep. 1 A. & E. 8.

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July 30. THE PRESIDENT (SIR F. H. JEUNE). In this case the question raised is whether Messrs. Phillips & Walton, the vendors of certain coal to the Orienta Steam Yachting Association, Limited, by whom the *Orienta* steamship is owned, are entitled to a maritime lien on the vessel in respect of such part of the price of the coal as is the subject of the action. The Yorkshire Trust, Limited, and the Securities Insurance Company, Limited, appear as interveners in order to assert their prior right as mortgagees of the vessel.

The question arises in the following way. Edmund Elliott, the plaintiff, is the master of the *Orienta*. By two letters dated January 16 and 18 respectively, which passed between Messrs. Phillips & Walton and the Orienta Company, after some negotiations conducted by a Mr. J. W. Adamson, Messrs. Phillips & Walton agreed to bunker the steamship *Orienta* (her name then being the *La Plata*) in the East India Dock with about 1200 tons of Cardiff steam coal. The terms of payment stipulated for by Messrs. Phillips & Walton, as expressed in their letter and agreed to by the Orienta Company, were: "payment by captain's draft in our favour upon you, and accepted by you, payable as to one-half of the amount of invoice three days after sailing, and the other half at sixty days from date of shipment; these documents to be handed us when our steamer with the coals is put alongside of SS. *La Plata*." Accordingly for these coals two bills of exchange were given by E. Elliott, drawn upon the Orienta Company, of which one was honoured and the other forms the subject of this action, having been accepted but not paid by the Orienta Company.

Some question was raised at the trial whether the whole of the coals supplied were for the use of the ship, the fact being that after the lighter was alongside it was found that some ballast in one of the bunkers prevented that bunker being used for coal, and accordingly about 300 tons of coal were never taken by the *Orienta*. It is clear, however, that but for this circumstance the *Orienta* would have taken them, and that they were necessary for her voyage, as a further supply of coals to the extent of 500 tons had to be procured in the Mediterranean; and, further, the Orienta Company also may allocate the payment

they have made to the coals not in fact shipped. This matter may therefore be put aside; as may also all question of liability of the company, who do not defend the action, to the plaintiff, including the question of such liability extending to the ship after satisfaction of the interveners' claim.

It was stated with perfect candour on behalf of Messrs. Phillips & Walton, the real plaintiffs, that their object in stipulating for payment by master's draft was to entitle themselves to a maritime lien by virtue of s. 1 of the Merchant Shipping Act, 1889, and there can be no doubt that the Orienta Company intended by agreeing to confer such lien if they could, and the master gave the bills by arrangement with his owners for that purpose. Mr. Phillips, a partner in the firm of Phillips & Walton, said that they were informed by Adamson, in answer to inquiry, that the company was entirely satisfactory; and that no further inquiry was made as to the solvency of the company or as to any existing mortgage on the ship. In fact, the company, although considerable sums were due to it, had at the time only 30*l.* to their credit at their bankers, and they subsequently became insolvent.

It is clear that the owners could not directly have given to Messrs. Phillips & Walton a maritime lien for the price of the coals purchased from them, and the question is whether they could effect this object, and bring the matter within the words of s. 1 of the Merchant Shipping Act, 1889, by employing the instrumentality of their master.

There can be no doubt that the object of that section was to give to the master a maritime lien for the disbursements for which, in consequence of a series of decisions on the effect of the 10th section of the Admiralty Court Act, 1861 (before the case of *The Sara* (1)), it was believed that he had such a lien, and the section also placed liabilities on the same footing as disbursements in this respect. The words of the section express the lien to be for "disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship." It appears to me, further, that the section was intended to give a lien for disbursements only in the

(1) 14 App. Cas. 209.

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cases in which before *The Sara* (1) it was considered to exist. I should infer this from the history of the Act which was referred to in *The Castlegate* (2), and I think that the use of the words "properly" and "on account of the ship," and perhaps also the previous words "so far as the case admits," is designed to confine the lien conferred within these limits. I can imagine no reason why Parliament should have thought it desirable, in prejudice of the rights of mortgagees, to permit the creation of a maritime lien, except in the cases where for many years it was believed to exist.

What was held before the decision in *The Sara* (1) was that the master had a lien for his disbursements; I omit reference to his liabilities, as in that period it was not settled whether liabilities and disbursements stood on the same footing (see *The Feronia* (3))—a distinction now rendered immaterial by the words of the Act. But the question is: What were the disbursements for which it was believed the master could create a maritime lien?

It appears to me impossible to believe that in all cases where a master expended money in a purchase for the ship, or pledged his liability for it, a maritime lien was, or could ever have been supposed to be, created. Such law would, I think, be inconsistent with the jurisprudence which recognised no maritime lien for necessaries, and no right in the owner to create such a lien in respect of his expenditure on his ship. It would also make the position of a mortgagee of a ship one of precarious and doubtful value, perhaps even almost illusory. But if all disbursements and liabilities of the master for the ship cannot be supposed to give rise to a maritime lien, what is the criterion of those which have this operation?

The test suggested by counsel for the interveners is that such disbursements were those for which by virtue of his general authority, and without express authority, a master could pledge his owners' credit, or, in other words, those which he made strictly as master—a test which probably expresses the same thing as was intended by Lord Macnaghten by the words at the commencement of his judgment in *The Sara* (4), "disbursements made by

(1) 14 App. Cas. 209.
(2) [1893] A. C. 38.
(3) Law Rep. 2 A. & E. 65.
(4) 14 App. Cas. 209, at p. 221.

the master of a ship in the ordinary course of his employment." I think that this test is correct. Of course, under what circumstances in foreign and home ports, respectively, and for what purposes a captain may, without express authority, pledge his owners' credit, has been often considered, for example, in the cases of *Mitcheson* v. *Oliver* (1), *Gunn* v. *Roberts* (2), and *Webster* v. *Seekamp*. (3) Of course, also, when there is express authority the owner is liable to the captain and to those with whom the captain dealt, and perhaps in some of such cases the ship may be made liable on the principles indicated with regard to necessaries by Fry, L.J., in *The Heinrich Björn*. (4) But I am not aware of any authority which shews that the captain was ever supposed to be able to create a maritime lien on the ship, except when within the general scope of his authority he could have pledged his owners' credit.

The distinction between disbursements which were and were not believed to give rise to a maritime lien has not, so far as I know, been the subject of much authority; but it was clearly drawn as long ago as 1726 by Sir Joseph Jekyll in the case of *Watkinson* v. *Bernardiston*. (5) In that case the master had disbursed moneys abroad for the use of the ship, and had also, at the direction of the owners, become liable for and paid sums of money for provisions and materials for the ship while lying in the Thames. He had also paid seamen's wages, and had a claim for wages due to himself. In a question between the respective rights of the master and of a mortgagee, it was held that for the demands of the master in respect of what was done for the ship in the Thames there was no lien, but that there was a lien for the sums disbursed abroad, as also for the wages It is, I think, clear, when the words of the master's report, the declaration of the Master of the Rolls, and the words of the reporter of the case, are read together, that what the learned judge held was that for disbursements in a home port, where recourse could be had to the owners, the master had no lien in priority to a mortgagee, but that he had such a lien in respect

(1) 5 E. & B. 419, at p. 440.
(2) Law Rep. 9 C. P. 331.
(3) 4 B. & A. 352.
(4) 10 P. D. 44, at p. 54.
(5) 2 P. Wms. 367.

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of his disbursements when on his voyage, made by reason of necessity.

This decision was no doubt erroneous, according to subsequent decisions before the Admiralty Court Act of 1861, and would have been erroneous, as we now know, if given after that Act, in holding that disbursements or liabilities of the master abroad (apart from bottomry) would create a lien; but I refer to it because it shews that it was not even at that time supposed that a master making disbursements for the ship by authority of the owners, and for which he could pledge their credit only by such authority, could create a lien on the ship, and shews that the reason for this was that creditors could and should resort to the owners for payment.

In the case of *The Chieftain* (1) Dr. Lushington held that a maritime lien existed in respect of a small sum laid out, apparently without express authority, for the ship by a person whom he held in fact was acting as master and receiving wages as such; but he declined to allow such a lien in respect of a large sum for necessaries for which the master rendered himself liable. It is true that Dr. Lushington appears to base his judgment on the distinction between disbursements and liabilities; but it is remarkable that in a comment on that case in his report on *The Red Rose* (2) Mr. Rothery suggests that the real ground of the decision may have been that the transaction as to the purchase of these necessaries "had taken place in this country with the cognizance, and no doubt under the directions, of the owner, and the Court may very well have thought that it was merely an attempt to shift the burden of these charges from the shoulders of the owners to those of the mortgagee." If Mr. Rothery's view of the case be correct, in a case very like the present, the claim for a lien was disallowed; and certainly in his opinion—and no one probably was more cognizant of the current practice of the Admiralty Court—a purchase even of necessaries by a captain in this country, by express authority of the owners, did not create a maritime lien in the captain's favour.

In the case of *The Great Eastern* (3) it appears to me clear

(1) Br. & L. 104. (2) Law Rep. 2 A. & E. 80.
(3) Law Rep. 2 A. & E. 88.

that Sir Robert Phillimore had the same distinction before his mind. That was an action for necessaries for the *Great Eastern*, ordered by the master, Sir James Anderson, in Liverpool. The learned judge held that the owners rendered themselves liable by holding out Sir James Anderson as their master to the vendors of the necessaries; but he expressly abstained from saying whether the master had authority to pledge the credit of his owners in a home port, or whether a maritime lien on the ship was created.

There have been many decisions on the Admiralty Court Act of 1861 before the case of *The Sara* (1); but I cannot find that in any of those cases a maritime lien has ever been held to be created where it appears that the captain pledged his owner's credit otherwise than by virtue of his general authority to do so. The only instance to which counsel could refer me was *The Feronia* (2), in which it was said that items 21 and 22 were items of expenditure in a home port, and therefore not within the general authority of the master to make. But apart from the question whether such expenditure might not be within a master's general authority, even in a home port, it is I think clear that these items were treated as allowable deductions from freight, and as such sanctioned by the case of *Bristow* v. *Whitmore*. (3)

If the present case were treated as one of the purchase of coals by the master, I think it is one in which he could not, under the circumstances of the supply being in the place where the owners carried on business, and at the beginning of a new voyage, have made his owners liable to the vendor without express authority. But it is to be observed that the present case is not even that of a liability incurred by a master in a purchase by him, by express authority, for the ship. There was no purchase by the master at all. The owner made a contract himself with the vendor of the coals, and, as a term of it, agreed to his master's liability being pledged by his giving bills. Evidence was given before me that this was entirely unusual. But apart from such evidence, it seems to me impossible to say that the master, in thus, at the request of his owner, lending his name, was acting within the ordinary course of his employment as master. The whole

(1) 14 App. Cas. 209. (2) Law Rep. 2 A. & E. 65.
(3) 9 H. L. C. 391.

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proceeding was avowedly an ingenious device to create a liability in the master within the meaning of s. 1 of the Act of 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages; but I think that it fails, because the Act did not mean, and does not say, that a lien can be so created. The result is that there will be judgment for the interveners with costs; but the plaintiff will be at liberty to move for such judgment as he may be advised against the defendants, the owners of the *Orienta*.

Solicitors for plaintiff: *Botterell & Roche.*
Solicitors for interveners: *Ince, Colt, & Ince.*

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Admiralty — Jurisdiction — Personal Injuries—Action in rem — Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7—"*Damage done by any Ship.*"

By s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

The plaintiff issued a writ in rem, and arrested a vessel, claiming damages for personal injuries sustained through falling down into the hold of that vessel, owing to the hatchway being only covered with a tarpaulin at the time that he was crossing to his own ship, which was moored outside the first mentioned vessel in the Regent's Canal Dock.

On motion to set aside the writ for want of jurisdiction:—

Held, by Bruce, J., that the action must be dismissed, for, though the word "damage" included personal injury, the damage was not "done by any ship" within the meaning of the Act.

MOTION by the defendants, the owners of the Norwegian barque *Theta*, to set aside the plaintiff's writ of summons, and dismiss the action, for want of jurisdiction.

The facts, so far as material for the purposes of the argument, were that:—

On June 5, 1894, about 9 P.M., whilst the *Theta*, which had completed her discharge, was lying moored in the Regent's Canal Dock, the plaintiff, William Yule, chief engineer of the steamship *Faithful*, proceeded to cross the *Theta* in order to reach his own vessel, which was moored outside the other. In stepping

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from the gangway he fell down into the hold of the *Theta* owing to the hatchway being only covered by a tarpaulin.

On June 27 the plaintiff, relying on s. 7 of the Admiralty Court Act, 1861 (1), issued a writ in rem against the owners and parties interested in the *Theta* claiming "damages for personal injuries sustained by him whilst on board the ship or vessel *Theta*, in consequence of the negligence of the defendants' servants," and the vessel was arrested the same day.

H. Parker Lowe, for the defendants appearing under protest. There is no jurisdiction to entertain this action. At the time the alleged injuries were sustained the *Theta* was not on the high seas, but in the body of a county, and was being used merely as a gangway to enable the plaintiff, who is a stranger to the vessel, to cross to his own ship. Assuming that the personal injuries were sustained by the negligence of the defendants' servants, such injuries do not come under the word "damage" as used in the Act, nor was the damage done by a ship, as the instrument, within the meaning of the Act, so as to found Admiralty jurisdiction in rem. It is true that in 1867, in *The Sylph* (2), where a diver in the Mersey was caught in the paddle-wheel of a steamer, it was held that there was jurisdiction; but in 1871, in *Smith* v. *Brown* (3), though the actual decision was under Lord Campbell's Act, the Court dealt with the wider question of personal injuries and dissented from the three cases of *The Sylph* (2), *The Guldfaxe* (4), and *The Beta*. (5) In 1872, in *Simpson* v. *Blues* (6), and in 1884, in *The Vera Cruz* (7), Brett, J., delivering the judgment of the Court in the one case, and Lord Blackburn in the other, refer with approval to the dicta in *Smith* v. *Brown*. (3) In *The Zeta* (8) the remarks of Lord Herschell upon *The Sylph* (2) are obiter, and he does not comment upon *Smith* v. *Brown*. (3)

(1) 24 Vict. c. 10, s. 7: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

(2) Law Rep. 2 A. & E. 24.

(3) Law Rep. 6 Q. B. 729.

(4) Law Rep. 2 A. & E. 325.

(5) Law Rep. 2 P. C. 447.

(6) Law Rep. 7 C. P. 290.

(7) 10 App. Cas. 59, at p. 72.

(8) [1893] A. C. 468.

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[The following cases were also referred to: *The Uhla* (1); *The George and Richard* (2); *The Max Morris.* (3)]

Sir Walter Phillimore, for the plaintiff. The defendants' servants negligently stretched a tarpaulin over the hatchway, and thereby created a trap for the plaintiff who was lawfully crossing the defendants' vessel at night when no lights were provided. A Court of Admiralty has jurisdiction in respect of such a claim for personal damage so caused, for it was an act of commission falling within the class of cases of which *The Sylph* (4) is an example. These cases are distinct decisions in favour of the Admiralty jurisdiction, and cannot be deemed overruled by the dicta in *Smith* v. *Brown* (5), which were not necessary for the decision, or by doubts expressed in *The Vera Cruz* (6), where the point was whether an action in rem would lie under Lord Campbell's Act.

The question of the jurisdiction of the Court of Admiralty was recently considered in the case of *The Zeta* (7), following on that of *Reg.* v. *Judge of the City of London Court.* (8) It is clear from Lord Herschell's judgment in the former case that the decisions in favour of Admiralty jurisdiction in respect of personal injuries were present to his mind and were approved of by him.

The plaintiff is an Englishman; he was in an English dock going to an English ship, and the object of giving a right in rem against the ship on which the injury was sustained, is to enable a plaintiff to get at parties whom he could not otherwise reach, and thus secure an appearance as well as obtain the fruits of a judgment.

[The case of *The Clara Killam* (9) was also referred to.]

Cur. adv. vult.

July 3. BRUCE, J. In this case the defendants move to set aside the writ and to dismiss the action with costs, on the ground

(1) Law Rep. 2 A. & E. 29 (n.).
(2) Law Rep. 3 A. & E. 466.
(3) 30 Davis' Reports, 1.
(4) Law Rep. 2 A. & E. 24.
(5) Law Rep. 6 Q. B. 729.
(6) 10 App. Cas. 59, at p. 72.
(7) [1893] A. C. 468.
(8) [1892] 1 Q. B. 273.
(9) Law Rep. 3 A. & E. 161.

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that this Court has no jurisdiction. The question turns on the words in the Admiralty Court Act, "damage done by any ship."

I see no reason to doubt that the word "damage" is as applicable to damage done to a person as to damage done to property. It would be doing great violence to the ordinary meaning of the word to limit it to damage to property.

Many instances might be quoted from classical English writers where the word "damage" is used as applicable to mischief done to the person. It is enough to cite one passage from that storehouse of classical English, the authorized version of the New Testament. In the 27th chapter of the Acts, at the 10th verse, the speech of St. Paul is rendered thus: "Sirs, I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives."

Not only does the word "damage" in its ordinary meaning apply to mischief to persons, but I think that it is established by authority that the word is used in that sense in the statute now under consideration. It is true, as was said in the case of *The Zeta* (1), that "it is impossible to reconcile all the opinions which have proceeded from the Bench from time to time;" but the more recent opinions which have been expressed by judges of high authority in the Court of Appeal and the House of Lords favour this view. In the case of *The Vera Cruz* (2) the Master of the Rolls said: "I do not say that damage need be confined to damage to property, it may be damage to person." In the House of Lords, in the case of *The Zeta* (3), Lord Herschell, after mentioning several decided cases, said: "It is not necessary to trouble your lordships with all the cases. It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question." For the reasons I have given I must hold that the words "damage done by any ship" include damage to persons.

Whilst, however, giving this meaning to the word "damage," I cannot think that the present case falls within the provisions

(1) [1893] A. C. 468. (2) 9 P. D. 96, at p. 99.
(3) [1893] A. C. 468, at p. 478.

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of the Act of Parliament. Damage done by a ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz* (1), the ship is the "active cause" of the damage. The same idea was expressed by Bowen, L.J., who said the damage "done by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument."

In this case, to put it at the highest, those in charge of the ship so placed a tarpaulin over the hatchway as to make a trap into which the plaintiff fell, whilst lawfully crossing the deck of the ship to reach his own vessel. The ship cannot be said to have been the active cause of the damage. The damage was done on board the ship, but was not, I think, within the meaning of the Act, done by the ship. Therefore, I must allow the motion with costs.

Action dismissed with costs, and plaintiff directed to extract the release of the vessel.

Solicitors for plaintiff: *Pritchard & Sons.*
Solicitor for defendants: *Robert Greening.*

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May 11; *June* 8; *July* 13.

[IN THE CONSISTORY COURT OF LONDON.]

IN RE KERR.

Ecclesiastical Law—Faculty—Parish Church closed for "Burials" under Order in Council—The Church Building Act, 1818 (58 *Geo.* 3, *c.* 45), *s.* 80—*The Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 343, *and Sched. V. Part III.* (11 *&* 12 *Vict. c.* 63, *s.* 83)—*The Burial Act*, 1853 (16 *&* 17 *Vict. c.* 134), *s.* 3—*Grant of Faculty for Interment below Floor of Church of Urn containing Cremated Remains—Register Book.*

The vicar and churchwardens of a parish church, in the diocese of London, built under the Church Building Act, 1818, and closed for burials by virtue of an Order in Council under the Burial Act, 1853, concurred in an application by the widow of a parishioner whose dead body had been cremated praying the Consistory Court of London to authorize by faculty the formation of a niche in the wall of the church inside the church and above the level of the floor, and the permanently placing therein of a sealed urn containing the cremated ashes of such dead body. By the affidavit to lead the faculty it appeared that the

(1) 9 P. D. 96, at p. 99.

deceased during his life had expressed a wish that in the event of his death his remains might be cremated, and a certificate was brought in to the effect that the vestry of the parish was in favour of the remains being interred beneath the church:—

Held, that the burial of the cremated ashes of a dead body in the church had not been prohibited by the Church Building Act, 1818, the Public Health Acts, 1848 and 1875, or by the Order in Council closing the church under the Burial Act, 1853; the provisions in those Acts as to "burial" not applying to the burial of the remains of a corpse after it had been reduced to ashes, and that the Court had jurisdiction in its discretion to grant the faculty as prayed, but must decline to do so having regard to the inconvenience which might ensue in case of alterations in the church, &c., if the urn was deposited in the church wall according to the proposal of the applicant:

Held, also, that the Court, having ascertained from the Home Office that no objection on sanitary grounds was entertained by the Home Secretary to the interment of the urn containing the remains below the floor of the church, was prepared, at the request of the applicant, to decree the issue of a faculty for the urn and its contents being so interred below the church, subject to a proper fee for the interment being paid to the incumbent of the parish.

Semble, that cremated remains cannot lawfully be interred in or under a parish church except under the authority of a faculty from the Ordinary.

THIS was an application on behalf of Olivia A. M. Kerr, of 108, Belgrave Road, in the county of Middlesex, the widow of Charles Wyndham Rodolph Kerr, late of the parish of St. Saviour's, Pimlico, praying the Court to decree a faculty for the immurement in a niche to be made in the south wall of the parish church of St. Saviour's, Pimlico, within the church and above the level of the floor of the church, of a sealed urn containing the cremated remains of her deceased husband, the said C. W. R. Kerr, and the erection in front of the place where the urn would be immured of a memorial tablet to the memory of her said deceased husband according to a design and with an inscription approved by the vicar and churchwardens of the said parish church of St. Saviour's, Pimlico.

The petition brought in by the applicant, and an affidavit made by her verifying the same, alleged that after the death of the said C. W. R. Kerr on February 7, 1894, his corpse had been cremated at the crematorium, Woking, on February 10, 1894, and the cremated ashes at the date of the petition remained there deposited in a sealed-up urn; that the said C. W. R. Kerr had left no directions as to place or mode of burial, but both to the applicant and to others constantly expressed his great wish in

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the event of his death that his remains should be cremated; that the applicant desired that the said sealed urn should be permanently placed in a niche in the south wall of the church of St. Saviour's, such niche to be afterwards sealed up, and that a memorial tablet, as above stated, to the memory of the said C. W. R. Kerr might be erected in front of the place where the urn would be immured, and that the consent of the vicar and churchwardens of St. Saviour's, Pimlico, to the grant of a faculty as prayed for immuring the said ashes and the erection of such tablet had been obtained by the applicant.

May 11. The application now came on in Court before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.), and evidence in support thereof having been given orally by the vicar and churchwardens of St. Saviour's, Pimlico, a member of the firm of the solicitors for the applicant moved for the faculty. The arguments in support of the application can be gathered from the judgment.

[It appeared that the parish church of St. Saviour's, Pimlico, had been built under the 59 Geo. 3, c. 134, an Act incorporating the Church Building Act, 1818, and that the niche proposed by the applicant to be made under the faculty asked for would be within the church and above the level of the floor of the same.]

DR. TRISTRAM. The Court will consider as to what order it will make in this case, and before delivering judgment will direct a communication to be made to the Home Office for the purpose of ascertaining whether or not in the view of the Home Secretary the grant of the faculty asked for would be objectionable on sanitary grounds. Further, before final judgment is given the vestry of the parish of St. Saviour's ought to have an opportunity of expressing its opinion on the application for the faculty, and in order that this may be done any resolution which the vestry may pass with reference to the matter may be brought to the notice of the Court by a copy thereof being filed in the registry before the next Court day.

[In accordance with the above intimation of the Court a vestry

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meeting of the parishioners of St. Saviour's, Pimlico, was subsequently held, and a copy of a resolution of vestry come to at such vestry meeting in favour of the cremated remains being interred within the church below the surface of the floor thereof was filed in the registry as directed by the Court.

Cur. adv. vult.

June 8. DR. TRISTRAM. The Court in this case is asked to grant a faculty for the immurement of an urn, at present deposited at the Woking Crematorium, containing the cremated ashes of the late Mr. Charles Wyndham Rodolph Kerr, in the south wall of the parish church of St. Saviour's, Pimlico, and for the erection of a tablet to his memory in front of the place where the urn is proposed to be immured.

The deceased resided for upwards of twelve years previous to his death in the parish of St Saviour's, and was a regular attendant at his parish church. He died on February 7, 1894, and on the 10th of the same month his remains were taken to the parish church, where the first part of the order of the burial of the dead was read, and his body was afterwards cremated at the crematorium cemetery of Woking, and the ashes deposited in a sealed urn.

The petitioner is his widow, and makes this application with the concurrence of the vicar and churchwardens of the parish. The Bishop of London also concurs in the application, provided there are no legal objections to its being granted.

Similar applications have of late been made to me in chambers; but there being no precedent for the granting of such a faculty (cremation having been unpractised in this country prior to 1882), I declined to entertain them unless the faculty was moved for in Court. The cremation of a dead body, though not contemplated, is not prohibited either by Ecclesiastical or by Statute Law, nor yet by common law, unless it is done so as to amount to a public nuisance, or with a view to prevent a coroner's inquest being held upon it: *Reg.* v. *Price.* (1)

There is, therefore, no more reason why a faculty should not now issue for the interment in a church of an urn containing the

(1) 12 Q. B. D. 247.

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cremated ashes of a deceased person than formerly for the interment of a body encased in a leaden coffin in a vault in a church, unless the interment in a church of cremated ashes in an urn is objectionable on sanitary grounds, or is prohibited by statute.

The Court will assume, until it is ruled by expert evidence to the contrary, that the interment of cremated ashes in an urn in a church is on sanitary grounds unobjectionable. If it is prohibited by statute it must be either by s. 80 of the first Church Building Act, 1818 (58 Geo. 3, c. 45), by reason of this being one of the Acts under which this church was built, or by s. 83 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), re-enacted by the Public Health Act, 1875, by reason of the church being located in an urban district, or by s. 3 of the Burial Act, 1853 (16 & 17 Vict. c. 134), by reason of its being located in a district closed by an Order in Council for burials.

The first Church Building Act, 1818, enacts in s. 80: "It shall not be lawful to break up the pavement or to open the soil beneath the same, within any church or chapel to be erected under the provisions of this Act, for the purpose of burial . . . . Provided always that nothing herein contained shall extend or be construed to extend to prevent the burial of dead bodies in any vault wholly arched with brick or stone, which may have been constructed for such purposes under any church or chapel, and to which the only access shall be by steps on the outside of the external walls thereof; and if any burial shall take place otherwise than is herein provided . . . . the person or persons ordering or causing the same to be made shall for every such offence on conviction thereof" before two justices forfeit the sum of 50*l.*, one moiety of the penalty to be given to the informer, and the other moiety to the use of the poor of the parish.

Sect. 83 of the Public Health Act, 1848, enacts, "No vault or grave shall be constructed or made within the walls of or underneath any church or other place of worship built in any urban district after the 31st day of August, 1848, and whosoever shall bury, or cause, permit, or suffer to be buried, any corpse or coffin in any vault or grave constructed or made contrary to

this enactment shall for every such offence be liable to a penalty not exceeding 50*l*., which may be recovered by any person, with full costs of suit, in an action of debt."

Sect. 3 of the Burial Act, 1853, enacts, "It shall not be lawful, after the time mentioned in any such Order in Council for the discontinuance of burials, to bury the dead in any church . . . . within the parts to which such order extends, except as in the Act or in such Order excepted; and every person, who shall, after such time as aforesaid, bury any body or in anywise act or assist in the burial of any body, contrary to this enactment, shall be guilty of a misdemeanour"; and s. 2 of 18 & 19 Vict. c. 128, further enacts, that any person who shall knowingly and wilfully "bury any body in any church" within the limits in which burials have by an Order in Council been ordered to be discontinued shall upon summary conviction before two justices of the peace forfeit a sum not exceeding 10*l*.

The question whether the depositing of cremated ashes permanently in this church is by statute prohibited depends, upon whether or not in all or in any of the sections above cited there are expressions used which may be interpreted as referring to a corpse after it has been reduced to ashes by cremation in such terms as to amount to a prohibition of the interment of such ashes underneath any church, to which the sections relate.

It is matter for observation, that in none of these sections does there occur a single expression which indicates that they were intended to apply to cases of cremation.

A careful examination of them will shew that the prohibitions therein contained refer only to the burial of a dead body or corpse (cadaver), and not to the burial of a corpse reduced to ashes (cineres), which after it has been so reduced cannot with accuracy of language be termed a corpse.

The first paragraph of s. 80 of the Act of 1818 prohibits, for the purpose of burials, the breaking up of the pavement or the opening of the soil beneath any church built under that Act without saying the burial of what; but as the next paragraph provides that the previous paragraph shall not extend to prevent the burial of dead bodies in an arched vault having an entrance

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only from outside the church, the term burial in the first paragraph should be read as limited to the burial of dead bodies. The Public Health Act of 1848 inflicts a penalty only for the burial of a corpse or coffin in a church subject to its provisions, and the Burial Act of 1853 makes it a misdemeanour to bury *a body* in a church in contravention of its provisions.

It is to be observed, that these statutes being penal statutes are according to recent decisions "to be construed, so that no case shall fall within them, which does not fall within the reasonable meaning of their terms and within the spirit and scope of their enactment" (see Sir Benson Maxwell on Statutes, 2nd ed. p. 320).

If the interment of cremated ashes in an urn in a church is objectionable on sanitary grounds, such interment might well be held, but not otherwise, as falling within the mischief aimed at by the statutes.

But the absence of any reference to the case of cremation in them is what would be reasonably expected. For in this country from the establishment of Christianity up to some thirty years after the passing of the latest of these statutes cremation was unknown in practice. That it was so up to and after 1818, the date of the first statute, is, from the following passage in the judgment of Lord Stowell in the Iron Coffin Case, delivered in this Court in 1820, placed beyond doubt: "Before entering into the immediate question it may not be entirely useless or foreign to remark, that the most ancient modes of disposing of the bodies of the dead mentioned by history, are by burial or by burning, of which the former appears to be the more ancient. Many proofs of this occur in the sacred history of the patriarchal ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of his own person, imitated by that of his disciples and followers, has confirmed the indulgence of the natural feeling which appears to prevail, against the instant and entire dispersion of the body by fire, and has very generally established sepulture as the customary practice of christian nations. Sir Thomas Brown thus expresses himself,

in his quaint but energetic manner, in his treatise upon urn-burial: 'Men have been fantastical in the singular contrivances of their corporal dissolution; but the soberest nations have rested on two ways, inhumation and burning. That interment is of the elder date, the examples of Abraham and the Patriarchs are sufficient to illustrate; but Christians have abhorred the way of obsequies by fire, and though they sticked not to give their bodies to be burnt in their lives, detested that mode after death, affecting rather a depositure than an absumption, and conforming themselves to the will of God, which required them to return again, not to ashes, but unto dust.—But burning was not fully disused till Christianity was finally established, which gave the final extinction to these sepulchral bonfires'": *Gilbert* v. *Buzzard & Boyer.* (1)

From a communication made to me by the secretary of the Cremation Society of England since the last sitting of the Court, it appears that a body was cremated in this country in 1769, and that the next known case of cremation in England occurred in 1882, which has been followed up by numerous other cases at the Woking Crematorium.

Upon this state of facts, the presumption is, that the legislature by the above provisions relating to burials within churches intended to modify and generally to suppress the then existing system of burying dead bodies underneath churches as objectionable on sanitary grounds, but did not contemplate their extension to a system of burials unknown in this country, if on sanitary grounds it is unobjectionable.

Unless the Home Secretary, to whose office the sanitary regulations as to interments within churches by statute belongs, is advised, that such interments are objectionable on sanitary grounds, the Court will be prepared to decree a faculty in this case for the interment of the cremated remains of the deceased in the urn under the floor of St. Saviour's Church, Pimlico. The Court is not prepared to decree a faculty for their immurement in the church wall, and for the following reasons: There is no precedent for the issue of such a faculty. The absence of a

(1) 2 Hagg. Cons. pp. 340, 341.

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precedent would not, however, preclude the Court, in the exercise of its discretion, from making one, provided it were satisfied that the end desired by the petitioner was unattainable by adherence to an existing or to a previous practice, as well as that the creation of such a precedent would be unattended with future inconvenience.

The end desired by the present application, I take it, is to secure the ashes of the deceased being placed permanently in consecrated ground and within this church. This end may be attained by the grant of a faculty for their interment under the floor of the church, in like manner as bodies encased in leaden coffins were formerly interred within churches under faculties. The granting of the faculty in the form prayed would also be liable to be attended with the following inconveniences. The proposed immurement might in some churches occasion a disfigurement to, or a settlement in, the church wall, and it is extremely difficult for the Court to provide against such contingencies. In the event also of an enlargement of the church being required by the addition of an aisle, a transept, an organ chamber, or a vestry, or any other alteration that would involve an interference with that part of the wall in which the urn is deposited, such a practice would impose a new duty upon the incumbent and churchwardens—namely, that of communicating with the family of the deceased by citation or otherwise in order to ascertain their wishes as to the place of removal; and the expense of the removal might in some cases fall upon the churchwardens.

At the hearing the Court intimated that before delivering judgment it desired to have the opinion of the vestry taken on this application; and from a certificate since filed in the registry it appears that the matter has since been brought before a parish vestry summoned for the purpose, and that, after hearing the petition read, the following resolution, proposed by Lieut.-General Greene Wilkinson and seconded by Mr. St. John, was carried unanimously: "That the urn containing the remains of Mr. Kerr should be placed under the floor of the church of St. Saviour's, Pimlico." From this it is clear that the vestry, whilst

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concurring in the faculty going in the form proposed by the Court, is not in favour of its being granted for the immurement of the urn in the church wall. This resolution of the vestry is a further reason for the Court declining to grant the faculty in the form prayed.

In conclusion, the Court should observe that the construction of the above sections in these statutes primarily belongs to the Civil Courts, as a compliance with their provisions is enforceable by civil penalties. In such cases the practice of this Court is, where there has been no construction previously placed on the provisions in question by the Civil Courts, to place its own construction on them, and in the event of its arriving at the conclusion that the granting of the faculty might lead to a contravention of the statute to reject it; but if not, to intimate that it will be prepared to decree a faculty, unless within a time specified proceedings shall be commenced in prohibition to test the correctness of such construction.

The Court should further observe, that as by Common Law as well as by Ecclesiastical Law any person (subject to certain exceptions) dying in England is entitled to Christian burial in the accustomed form in a consecrated burial-ground belonging to his own parish, or to the parish in which he may have died, it is not competent to an executor or administrator, or to any other person on whom the law imposes the duty of burying the deceased, by cremation to deprive him of that right, unless he has left written directions or expressed in his life a wish to be cremated. The Court, therefore, would not have been prepared to grant the faculty in this case had not Mr. Kerr, as deposed to by his widow, expressed during his life his wish that his body after his death should be cremated. Without some evidence to this effect the granting of the faculty might be construed as an acquiescence on the part of the Court in the commission of an improper and illegal act.

The Court will lastly observe, that as a fee for interments in a faculty vault in the body of a church is due to the incumbent, there should be a reasonable fee payable to the incumbent on an interment in a church under a faculty of cremated remains. In the diocese of London such fees have always been settled by

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the vestry, and then submitted to the Chancellor for his approval and confirmation. This course should be pursued in the present case.

1894. July 13. The case was again called on.

DR. TRISTRAM. In this case an application was made to the Court by Mrs. Kerr for a faculty to authorize the immurement of an urn containing the cremated remains of her husband in the wall of his parish church. After carefully considering the application, I came to the conclusion, for reasons stated in my judgment delivered on the 8th of June last, that there were objections to the granting of a faculty in the form in which it was asked for, but that it was within the discretionary jurisdiction of the Court to decree one for the burial of the urn containing the cremated remains under the floor of the church, and I intimated that the Court, if so prayed, would be prepared to decree one for that purpose, provided Her Majesty's Principal Secretary of State for the Home Department entertained no objections on sanitary grounds to such burial taking place, and I directed a communication to be made to Mr. Asquith, as Home Secretary, on the subject.

The answer received from the Home Secretary to this communication is, that he sees no reason why the faculty to authorize cremated remains to be interred under the floor of the church of St. Saviour's, Pimlico, should not be granted.

The Court rejects the application for a faculty authorizing the immurement of the cremated remains in the wall of the church, but is prepared to decree a faculty, on one being prayed, for their interment under the floor of the church of St. Saviour's Pimlico.

[The solicitors for the applicant being present, thereupon prayed the Court to grant a faculty for the interment of the urn and its contents beneath the floor of the church, and for the erection of the memorial tablet; and the Court upon such prayer decreed a faculty to issue to Mrs. Kerr for the interment of the cremated remains of the deceased under the floor of the church, subject

to the payment of a fee of five guineas in respect of the interment, to the vicar of the parish of St. Saviour's, Pimlico. 1894

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In answer to the vicar the Court intimated that cremated remains could not be lawfully interred in any church except under the authority of a faculty, and further intimated that a notice of the burial of the remains should be entered in a parochial burial register to be kept in the church.]

Solicitors for applicant: *Lee, Bolton, & Lee.*

C. F. J.

[IN THE COURT OF APPEAL.]

C. A. 1894 *June* 20; *July* 16.

THOMASSET *v.* THOMASSET.

Divorce—Maintenance of Children—Child above the age of Sixteen—Jurisdiction—The Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*The Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.

The Court has power to make orders respecting the custody, maintenance, and education of children during the whole period of their infancy—that is, till they attain the age of twenty-one years.

Blandford v. *Blandford* ([1892] P. 148) overruled.

APPEAL from an order of Sir F. Jeune, the President of the Divorce Division.

On March 15, 1892, the petitioner, Mrs. Thomasset, obtained a decree of divorce from her husband, the respondent. On August 8, 1893, an order was made for the payment by the respondent to the petitioner of permanent alimony at the rate of 266*l.* per annum, and 23*l.* 6*s.* 8*d.* per annum for each of the four younger children of the marriage for their maintenance and education.

On March 27, 1894, Theodore, the eldest of these four children, attained the age of sixteen years; and on June 1, 1894, an order was made by the registrar, on the application of the respondent, that the allowance of 23*l.* 6*s.* 8*d.* for the maintenance of that child should cease. This order was affirmed by the President, who considered that he was bound by the authority of *Blandford* v. *Blandford*. (1)

From this decision the petitioner appealed.

(1) [1892] P. 148.

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Inderwick, Q.C., and *Searle*, for the appellant. The application is made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35, as amended by the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4. (1) There is no suggestion in either of those sections that the power of the Court is limited to cases where the children are under sixteen years of age. The contention that the Court has no jurisdiction to make orders respecting children between that age and twenty-one is derived from the practice of the Courts of Common Law on writs of habeas corpus. But the proceedings in the Divorce Court have no analogy to such cases; and even if the Court could not interfere as to the custody of infants above sixteen, that would be no reason against its making provision for their maintenance. Under the Judicature Act the Divorce Court has all the powers respecting infants which were formerly possessed by the Court of Chancery. *Blandford* v. *Blandford* (2), and the cases on which it was based, were wrongly decided: *Bacon* v. *Bacon* (3); *Seatel* v. *Seatel* (4); *Bent* v. *Bent* (5); *Milford* v. *Milford* (6); *March* v. *March* (7); *Benyon* v. *Benyon* (8); *Hunt* v. *Hunt* (9); Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 10.

(1) 20 & 21 Vict. c. 85, s. 35: "In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

22 & 23 Vict. c. 61, s. 4: "The Court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may, upon application (by petition) for this purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending. . . ."

(2) [1892] P. 148.
(3) Law Rep. 1 P. & D. 167.
(4) 4 Sw. & Tr. 230.
(5) 2 Sw. & Tr. 392.
(6) Law Rep. 1 P. & D. 715.
(7) Law Rep. 1 P. & D. 440.
(8) 1 P. D. 447.
(9) 8 P. D. 161.

Bayford, Q.C., and *Barnard*, for the respondent. Most of the cases relied on by the appellant relate to the variation of settlements. The practice of the Court in questions of custody has always been not to interfere in the case of children over fourteen if males, and over sixteen if females; and maintenance and education are put on the same footing in the statutes, and must be governed by the same rule: *Ryder* v. *Ryder* (1); *Webster* v. *Webster* (2); *Mallinson* v. *Mallinson* (3); *Blandford* v. *Blandford* (4); *In re Agar-Ellis* (5); Simpson on Infants (2nd ed. pp. 141, 142).

Inderwick, in reply, referred to *In re Ethel Brown.* (6)

Cur. adv. vult.

July 16. LINDLEY, L.J. (after stating the facts set forth above, said): The order of June 1, 1894, was affirmed by the President, not because he was of opinion that under the circumstances of the case it was just or expedient to vary the former order of August 8, 1893, but simply because, as a matter of law, that order ought to be discharged as regards the child who had attained sixteen. The object of this appeal is to have the view of the law reconsidered.

The question thus raised is one of very considerable importance, and renders it necessary to consider the jurisdiction and practice of the Divorce Court as regards the custody, maintenance, and education of children. Before, however, referring to the statutes which relate to this matter, it is desirable to state shortly the law and practice of the Courts of Common Law and Chancery and of the Ecclesiastical Courts as regards infants. In former times the Ecclesiastical Courts appointed guardians in testamentary causes and cases of intestacy (see Burn's Ecclesiastical Law, 9th ed. vol. 4, p. 142); but it is so long since these Courts have interfered between parent and child, that it is needless to refer further to them. The jurisdiction of Courts of Law was exercised by habeas corpus. The principles upon which Courts of Law act in dealing with persons brought up under a

(1) 2 Sw. & Tr. 225.
(2) 31 L. J. (P. & M.) 184.
(3) Law Rep. 1 P. & D. 221.
(4) [1892] P. 148.
(5) 24 Ch. D. 317.
(6) 13 Q. B. D. 614.

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habeas corpus are very clearly stated in Coleridge, J.'s, judgment in *Rex* v. *Greenhill* (1): "A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and disposes of many cases, namely, that the individual who has been under restraint is declared at liberty; and the Court will direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists; and where the child is in the hands of a third person, that presumption is in favour of the father." The age at which a child is deemed to have a discretion is fourteen in the case of a boy, and sixteen in the case of a girl (see *Reg.* v. *Clarke* (2)). The age of sixteen appears to have been adopted by reason of the language used in the statute 4 & 5 Ph. & M. c. 8 relating to the abduction of girls (see *Reg.* v. *Howes* (3)). After a child has attained the age of discretion, a Court of Common Law will set it free if illegally detained, but will not force a child against his or her will to remain with his or her father or legal guardian; although Lord Mansfield said that the Court had a discretion as to the order it would make (see *Rex* v. *Delaval* (4); and the note to *Ex parte Hopkins.* (5)) It must not, however, be inferred from the decisions referred to above that a father has no legal right to the custody of his child after he or she has attained the age of fourteen or sixteen. The father's right to such custody exists until the child attains twenty-one. This is clearly stated in Hargreave's note to Coke upon Littleton, 88 b. The right of the father was extended by 12 Car. 2, c. 24, s. 8, which entitled him by deed or will to appoint a guardian for any of his children until they attain twenty-one. The right of the father himself, as guardian of his children, to their custody until they attain twenty-one is taken for granted, although not expressly declared in this statute. Such right, moreover, was distinctly recognised

(1) 4 A. & E. 624, at p. 643.
(2) 7 E. & B. 186.
(3) 3 E. & E. 332.
(4) 3 Burr. 1435.
(5) 3 P. Wms. 152, at p. 155.

by Patteson, J., in an opinion given by him when a judge to Sir Erskine Perry (see *Reg.* v. *Clarke* (1)); and was again recognised by Cockburn, C.J., in *Reg.* v. *Howes.* (2) Lastly, this right was recently emphatically asserted by the Court of Appeal in *In re Agar-Ellis* (3), where an attempt was made to remove a girl over sixteen from the care of her father.

The jurisdiction of the Court of Chancery over infants is two-fold. In so far as it depends on the law relating to writs of habeas corpus, the power of the Court appears to have been the same as that of the Courts of Common Law. But, quite independently of those writs, the Court of Chancery exercised the power of the Crown as parens patriæ over infants, and in exercise of this jurisdiction the power of the Court has always been much more extensive than that possessed by Courts of Common Law under a writ of habeas corpus (see *In re Spence* (4); per Cotton, L.J., in *In re Agar-Ellis* (5); and *Reg.* v. *Gyngall.* (6)) The Court of Chancery has exercised this larger power in aid of fathers and guardians over children who have attained the age of discretion. Thus in *Hall* v. *Hall* (7) and in *Anon.* (8), boys over sixteen have been compelled to go to the schools selected by their guardians; and in *Todd* v. *Lynes,* referred to in Simpson on Infants (2nd ed. p. 145), a boy of seventeen was taken from a monastery and given up to the father. What the wishes of the boy were, however, does not appear. In the exercise of this jurisdiction the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare of the infants (see *In re McGrath* (9), and the cases there referred to).

As regards maintenance, the parents' obligations were measured both at law and in equity by the Poor Laws. I know of no case in which a father has been ordered by a Court of Equity to maintain his child. Courts of Equity ordered children to be maintained out of their own property, but the jurisdiction as to

(1) 7 E. & B. 186, at p. 199.
(2) 3 E. & E. 332.
(3) 24 Ch. D. 317.
(4) 2 Ph. 247, 252.
(5) 24 Ch. D. 317, 330.
(6) [1893] 2 Q. B. 232.
(7) 3 Atk. 721.
(8) 2 Ves. Sen. 374.
(9) [1893] 1 Ch. 143.

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maintenance and education was limited to such property. By the Judicature Act, 1873, each Division of the High Court can exercise the jurisdiction of the old Court of Chancery, and by s. 25, sub-s. 10, it is enacted that, "in questions relating to the custody and education of infants, the rules of equity shall prevail." This enactment enables all Divisions of the High Court, even on habeas corpus, to regard something more than the strict rights of fathers and guardians, and requires all the Divisions to recognise the cardinal principle on which the Court of Chancery always proceeded, namely, that in dealing with infants the primary consideration is their benefit. This view of the enactment was distinctly adopted and acted upon by the Court of Appeal in *Reg.* v. *Gyngall* (1), in which the Master of the Rolls explained some previous observations made by him in *In re Agar-Ellis* (2), which observations had apparently been misunderstood.

Having made these preliminary observations, I proceed to consider the jurisdiction of the Divorce Court as regards the custody and maintenance of the children of persons divorced or judicially separated. The Act of 20 & 21 Vict. c. 85, s. 35, runs thus. [The Lord Justice read the section, and proceeded:—] This power is extended to applications made after decree by the 22 & 23 Vict. c. 61, s. 4, which was as follows. [The Lord Justice read the section.] The jurisdiction thus conferred is far greater than that exercised by any Court previously existing. This is easily seen, and is explicitly stated in *Marsh* v. *Marsh* (3) and *Spratt* v. *Spratt.* (4) Nothing can be wider than the discretion and power conferred upon the Divorce Court by these two sections. It can order parents to maintain and educate their children at their own expense, which no Court could do before; and if it were not for the decisions to which I am about to refer, I should have thought that the power to order payment of a proper sum for the maintenance and education of the children under twenty-one of persons who had been divorced or judicially separated too clear for reasonable doubt. I can discover no ground for saying that infants between the ages of fourteen or

(1) [1893] 2 Q. B. 232.
(2) 24 Ch. D. 317.
(3) 1 Sw. & Tr. 312.
(4) 1 Sw. & Tr. 215.

sixteen and twenty-one are not children within the meaning of the above enactments. The necessity for providing children with maintenance and education does not stop at fourteen or sixteen, and neither the necessities of the case nor the language of the statutes require, or in my opinion admit, of a construction which limits the power of the Court to provide for children under fourteen or sixteen. However, there are decisions to the effect that the power of the Court is so limited, and the President has considered himself bound by these decisions. It is necessary to examine them. There are five in all, namely, three before the Judicature Act, and two since. Those before the Act are—in 1861, *Ryder* v. *Ryder* (1), custody; in 1862, *Webster* v. *Webster* (2), maintenance; in 1866, *Mallinson* v. *Mallinson* (3), custody. *Ryder* v. *Ryder* (1) was a decision of the full Court, consisting of Sir Cresswell Cresswell, Willes, J., and Channell, B., and it was there decided that the Court had no jurisdiction to make any order as to the custody of children over sixteen. The main ground of this decision appears to have been that Courts of Common Law did not make orders disposing of the custody of children over sixteen, and the Divorce Court had not the children before it, and could not therefore enforce against them any order it might make. This reasoning does not appear to me satisfactory. The Divorce Court could decide as between the parents which parent should have the custody of the children, and even if the Divorce Court could not bring the children before it and exercise jurisdiction over them, still, if the Divorce Court had made an order binding on the parents, such an order might, if necessary and proper, have been enforced by proceedings in Chancery. The effect of *Ryder* v. *Ryder* (1) practically was to enable a delinquent father to set up the age of his infant child as an answer to an application for an order for its custody. This was in my opinion an unfortunate decision, but it is one from which the Judicature Acts have in my opinion set us free. It was also held as a matter of law that maintenance followed custody, and that the Court had no jurisdiction to order maintenance for a child over sixteen. This was decided

(1) 2 Sw. & Tr. 225. (2) 31 L. J. (P. & M.) 184.
(3) Law Rep. 1 P. & D. 221.

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in *Webster* v. *Webster* (1), although Willes, J., in *Ryder* v. *Ryder* (2), had pointed out that it did not follow from that decision that maintenance could not be ordered for a child over sixteen. Even before the Judicature Act of 1873 the cases, in my judgment, went too far; but after that Act I confess my inability to understand how it can be right to hold that the statutory discretion conferred upon the Court is restricted within the narrow limits previously supposed; and in *Benyon* v. *Benyon* (3) an allowance was made for a child until twenty-one. However, in *Blandford* v. *Blandford* (4) the late President of the Divorce Court (Sir C. Butt) distinctly held that the Divorce Court had no power to make an order as to the custody or maintenance or education of a child who was over sixteen years of age. The attention of the President does not, however, appear to have been called either to the Judicature Act, 1873, or to the case of *In re Agar-Ellis* (5), and his decision, in my judgment, was erroneous. In the present case the learned President has simply followed *Blandford* v. *Blandford* (4), which he considered to be binding on him.

In my judgment, the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decisions. Such discretion ought to be exercised in each particular case as the circumstances of that case may require; and in exercising such discretion the Divorce Court, which has all the old powers of the Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, and education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts on which this case turns can, since the Judicature Acts, at all events, be exercised during the whole period of infancy—that is, until the children, whether males or females, attain twenty-one; although I do not say that a child

(1) 31 L. J. (P. & M.) 184.
(2) 2 Sw. & Tr. 225.
(3) 1 P. D. 447.
(4) [1892] P. 148.
(5) 24 Ch. D. 317.

who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes.

The appeal must therefore be allowed, and the case must be remitted to be dealt with on the merits freed from the fetter by which the discretion of the judge was previously considered to be restricted. The costs of the appeal must be borne by the respondent.

LOPES, L.J. This is a very important case, and, as we are expressing a view different to that previously entertained, I desire to give my reasons for the conclusion at which we have arrived.

The jurisdiction of the Divorce Court with regard to the custody, maintenance, and education of the children of parents divorced or judicially separated is derived from s. 35 of the Act 20 & 21 Vict. c. 85, extended to applications made after decree by 22 & 23 Vict. c. 61, s. 4. [The Lord Justice read s. 35 of the 20 & 21 Vict. c. 85, and continued :—] It is this section which the Court is now called upon to construe. If I were construing this section for the first time, apart from authority, I should have no hesitation in holding that a wide and comprehensive power was conferred on the Divorce Court, enabling the Court in the case of parents who by their misconduct had subjected themselves to its jurisdiction to order them to educate and maintain at their own cost any child of the marriage so long as the child was under the age of twenty-one—a power, however, to be exercised at the discretion of the Court according to the particular circumstances of each case in which its interference is invoked. It is difficult to see on what ground infants under the age of twenty-one are not to be regarded as children within the meaning of s. 35, nor can I understand on what ground the obligation to maintain and educate them is to determine at the ages of fourteen in the case of males, and sixteen in the case of females, even if the right to their custody was to terminate at those periods. There is nothing in s. 35 warranting such a conclusion, and, having regard to the words of the section, I should be slow to adopt such a construction of the section unless

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compelled so to do. Education and maintenance are as necessary between the ages of fourteen or sixteen and twenty-one as before those periods. To leave a child at the age of fourteen or sixteen without any provision for its maintenance and education, in the case of parents divorced or judicially separated, would be inhuman, and could never have been intended by the legislature.

Apart from authority, I do not understand that the President would have so interpreted the section in question. I rather gather that his view was in favour of the construction which I place upon the section; but he considered himself bound, as he was, by previous decisions of his Court. I proceed to consider those decisions, and the grounds upon which they were based.

Ryder v. *Ryder* (1) was decided in 1861 by the full Court, consisting of Sir Cresswell Cresswell, Willes, J., and Channell, B., and it was held that the Court, under the 35th section of the Divorce Act, has no jurisdiction to make any order as to the custody of children upwards of sixteen years of age; but Willes, J., said, at the conclusion of his judgment: "The question as to any order in respect of the maintenance of children above sixteen, if necessary, is not affected by our present decision"; and this dictum is more fully given in the report of the same case in the *Law Journal* (2), where the learned judge is reported to have said: "It is not to be inferred that the Court has no power to order the maintenance of children between the ages of sixteen and twenty-one; it may well confer a benefit on parties not before it; but that is a very different thing from its interfering with their liberty and ordering them to do something which they may not approve." *Webster* v. *Webster* (3) was decided in 1862 by Sir Cresswell Cresswell, and in that case the Judge Ordinary, although the dictum of Willes, J., in *Ryder* v. *Ryder* (1) was brought to his notice, held that the Court had no power to order that a provision should be made for the maintenance and education of a child above the age of sixteen, saying that "in his opinion the maintenance followed the custody." I am at a loss to understand on what the learned judge based this opinion, even if he thought the power with regard to custody

(1) 2 Sw. & Tr. 225.

(2) 30 L. J. (N.S.) (P. & M.) 44, at p. 47.

(3) 31 L. J. (P. & M.) 184.

terminated at that age. *Mallinson* v. *Mallinson* (1) came before the Court in 1866, and Lord Penzance, following *Reg.* v. *Howes* (2), considered that the power of the Court to control the custody of children terminated at the age of sixteen. These are all the decisions before the Judicature Act, 1873. Since the Judicature Act there are two cases to which it is necessary to refer. The one is *Benyon* v. *Benyon* (3), where an order was made for the maintenance of a child until twenty-one. The other is *Blandford* v. *Blandford* (4), the case upon which, as I understand, the President acted. In that case the late President held that the Court had no power to make provision for the maintenance of children above the age of sixteen. He says: "It is perfectly clear on principle and authority, that if I were dealing with the first of the matters mentioned in the sections—that is, with custody—I should have no power to make an order as to the custody of a child who had attained the age of sixteen years. When we come to the next matter—education—the sections can only be intended to apply to the education of young persons, and are certainly not intended to apply to the education of a child as long as he or she may live. Am I to put a different interpretation on the sections in regard to maintenance? My own opinion is that the sections dealing with the custody, maintenance, and education of children apply only to infants, and deal with all these matters exactly in the same way."

Such is the state of the authorities at the present time. In the Divorce Court, therefore, it has been held that, the right of parents to the custody of their children terminating at sixteen, no provision for maintenance or education can be ordered after that age. As I have said before, even if the right to the custody did terminate at sixteen, I should not be prepared to hold that the power to order a provision for maintenance and education was to be so limited. The Act of Parliament does not, in my opinion, associate custody, maintenance, and education together with a view of subjecting them to the same incidents, but intends the Court to deal with each in such a way as it thinks fit. The basis upon which the decisions are founded is the assumption

(1) Law Rep. 1 P. & D. 221.
(2) 3 E. & E. 332.
(3) 1 P. D. 447.
(4) [1892] P. 148.

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that the right of the parent to the custody of his child terminates at the age of sixteen. But is this correct? No doubt a writ of habeas corpus could not go to compel a child over the age of sixteen to return to the custody of the parent when such child was unwilling to submit to such custody; but, subject to such unwillingness on the part of the child, I can entertain no doubt that the parent is entitled to the custody of his child as against anybody detaining the child against its will up to the age of twenty-one. There can, I think, be no doubt that the right of parents to the control and guardianship of their children exists up to the age of twenty-one years, unless the parents have by their own grossly immoral and improper conduct forfeited their rights and abdicated their parental authority. The Act of 12 Car. 2, c. 24, gives the father the power of appointing a testamentary guardian. Sect. 8 of that Act gives to a father power, by a will or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time. Nothing can be a clearer declaration of the law, that the father himself, when living, has the right to the custody and tuition of his children whilst they are under the age of twenty-one years.

Reg. v. *Howes* (1) was a habeas corpus case; but Cockburn, C.J., says, in one part of his judgment: "Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of children until they attain the age of twenty-one years, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests." The Lord Chief Justice distinctly recognises that during infancy, and over sixteen, the right of the father still continues.

The right of the father to control and direct the education of children until twenty-one was very fully considered in the case of *In re Agar-Ellis* (2), and it was held that the right continued until the age of twenty-one was attained.

I am unable, therefore, to agree with the assumption upon

(1) 3 E. & E. 332. (2) 24 Ch. D. 317.

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which the cases in respect of maintenance in the Divorce Court have proceeded—namely, the right of the parent to the custody of his children terminating at the age of sixteen. In my judgment, the Divorce Court has power, under the sections in question, to make orders for the custody, maintenance, and education of children up to the age of twenty-one years—a power to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked. The appeal must be allowed, and the case go back to be dealt with on its merits.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.; G. D. Byfield.*

M. W.

[IN THE COURT OF APPEAL.]

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FODEN *v.* FODEN.

Divorce—Alimony—Alimony Pendente Lite—Jurisdiction—Suit for Nullity of Marriage—Application for Alimony after Decree Nisi.

The Court has jurisdiction to grant alimony pendente lite in a suit by the husband for nullity of marriage upon the ground that the wife was within the prohibited degrees, and the application may be made by the wife after a decree nisi has been pronounced, if the decree has not been made absolute.

Bird v. *Bird* (1 Lee, 209) followed.

Blackmore v. *Mills* (16 W. R. 893) explained.

APPEAL of the petitioner in a suit for nullity of marriage against an order for alimony pendente lite made in favour of the respondent, after the petitioner had obtained a decree nisi on the ground that the respondent was his deceased wife's niece.

Charles Bickerstaffe Foden, the petitioner, married on January 30, 1860, Sarah Robinson, who died on October 16, 1881. On October 7, 1890, the petitioner married Susan Barlow, who was the daughter of a sister of his former wife, Sarah Robinson. On August 23, 1892, he presented a petition for a decree of nullity, on the ground that his marriage with Susan Barlow, being a marriage with his deceased wife's niece, was within the forbidden degrees. No appearance was entered on behalf of the respondent, and on February 7, 1893, the President pronounced

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a decree nisi. On April 9, 1894, the respondent obtained leave by order of Gorell Barnes, J., to enter an appearance, with the object of presenting a petition for alimony pendente lite, and a petition for that purpose was filed on April 13. On May 7, 1894, the petitioner obtained an order for further time to file his answer to the petition for alimony. On the hearing before the registrar on May 23, an order was made by the registrar directing a further answer to the petition on certain points, and ordering the payment of interim alimony at the rate of 60*l.* per year from April 12, 1894.

The order was subsequently altered by directing that the alimony should be paid from the date of citation.

The petitioner appealed against the order for alimony, and also moved that the decree nisi might be made absolute.

E. T. Holloway, for the petitioner. The suit being undefended, the order ought not to have been made. It is contended that this rule of practice was laid down in *Blackmore* v. *Mills*. (1) [He referred to *Noblett* v. *Noblett*. (2)]

R. H. Pritchard, for the respondent. There was jurisdiction to make the order under s. 32 of the Matrimonial Causes Act, 1857. The practice of the Ecclesiastical Courts applies. According to that practice the respondent, as a wife de facto, is entitled to alimony pendente lite: *Bird* v. *Bird* (3); *Miles* v. *Chilton*. (4) [He also referred to *S.* v. *B.* (5), and *Langworthy* v. *Langworthy*. (6)]

Cur. adv. vult.

July 9. THE PRESIDENT (after stating the facts as above) continued:—There has, certainly, been some delay on the part of the respondent in asking for alimony, but, as the order of April 9 has remained without appeal, I do not think such objection can now be properly taken, nor was it pressed before me.

The point made on behalf of the petitioner is, that I have no

(1) 18 L. T. (N.S.) 586; 16 W. R. 893.
(2) Law Rep. 1 P. & D. 651.
(3) 1 Lee, 209, 418.
(4) 1 Rob. 684.
(5) 9 P. D. 80.
(6) 11 P. D. 85.

jurisdiction to make an order for alimony pendente lite in favour of the respondent, and the argument is based on the case of *Blackmore* v. *Mills*. (1) In that case the husband petitioned for a decree of nullity by reason of a previous marriage of the respondent. The respondent in an affidavit accompanying the petition for alimony swore that the marriage with the petitioner was irregular, as being contracted in Scotland after three days' residence, contrary to 19 & 20 Vict. c. 96, s. 1, and it also appeared that she was at the time committed for trial for bigamy, it being alleged that she had previous to her marriage with the petitioner gone through a form of marriage with four other men. The learned Judge Ordinary, as I gather from the two reports, which are not in identical language, refused in his discretion to allow alimony pendente lite, as the wife had "sworn herself out of Court" by her affidavit shewing that her marriage with the petitioner was null and void; and the learned judge undoubtedly, as reported, used words to the effect that, as soon as the Court is satisfied that there was no valid marriage, alimony pendente lite should be refused.

But there are other authorities which appear to me to shew that the discretion of the Court to grant alimony pendente lite, at any time before decree absolute, is not determined by the consideration that on the materials before the Court it appears to be shewn that the marriage was invalid.

It is clear that before the Act of 1857 alimony pendente lite could be ordered in suits for nullity, not only where the marriage was voidable, but where it was void—*Bird* v. *Bird* (2)—on the principle that, on the factum of marriage being admitted, alimony and costs pendente lite follow. In that case, a question of fact on which the validity of the marriage depended was, no doubt, in issue. But in the more recent case of *Miles* v. *Chilton* (3), decided in 1849, where the respondent by her answers admitted the nullity of the marriage, alimony pendente lite was allowed. It is true that the part of the answers containing this admission was rejected as irrelevant; but Dr. Lushington said as to this point, "I was called upon to reject the allegation which I have just

(1) 18 L. T. (N.S.) 586; 16 W. R. 893. (2) 1 Lee, 209, 418.
(3) 1 Rob. 684, at p. 700.

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been considering, as it does not contain facts relevant to the issue, but at the same time I was asked to bear in mind its contents for the purpose of refusing to receive the allegation of faculties. I apprehend, if I first of all reject the allegation—which I intend to do—I reject its entire contents, and then it will be no longer before me. But putting the question of the admission of that allegation aside, I am reluctant above all things to disturb the well-established principle of law that, when a fact of marriage is acknowledged or proved, alimony follows as a matter of course."

The case of *Langworthy* v. *Langworthy* (1) appears to me to be a strong authority in the present case. In that case a suit was brought for restitution of conjugal rights by the wife in November, 1883, alleging a marriage on January 10, 1883. The respondent asserted the illegality of the alleged marriage. Alimony pendente lite was applied for in June, 1884, but refused, on the ground that the fact of a marriage ceremony was in dispute. On July 7, 1885, the President (Sir James Hannen) held that the alleged marriage was null and void, and made a decree nisi. On August 14, 1885, as I find from the minutes of the Court, an order was made by the President for alimony pendente lite, at the rate of 1200*l.* per annum, from the date of the service of citation. What I am asked to do here is precisely what Sir James Hannen was asked to do in that case, namely, to give alimony pendente lite up to decree absolute, after a decision of the Court has declared the marriage which took place de facto to be void; and it is clear that the Court in that case in granting alimony acted on the principle that the fact of a marriage carried alimony pendente lite. It is true, the point of jurisdiction was not contested before Sir James Hannen; but I think that the reason for this was that the very experienced advisers of the husband felt that opposition must be useless.

I should think myself justified in allowing alimony pendente lite on the authority of *Langworthy* v. *Langworthy*. (1) But I will add that it appears to me that it would be unsafe to refuse alimony pendente lite on the ground that, as the case stands at any moment before the final decree, the Court believes the

(1) 11 P. D. 85.

marriage to be void. However clearly this may appear, it is always possible that the Queen's Proctor or some other intervener may put another aspect on the matter; and I think it more prudent to adhere to the principle that, as a rule, a marriage de facto carries the right to alimony pendente lite until it is finally declared to be void. The extension of the provision for decrees nisi to all nullity cases effected by the Act of 1873 (36 & 37 Vict. c. 31) appears to point to the possibility at least of intervention in all nullity cases.

I therefore dismiss the appeal from the registrar with costs. The application to make the decree absolute must stand over until an order for alimony pendente lite has been made.

H. D. W.

The petitioner appealed.

July 25. *Inderwick, Q.C.*, and *E. T. Holloway*, for the appellant. There was no jurisdiction to make an order for alimony pendente lite. The decree nisi having been made, there was no longer any lis pendens. The Court had found that the marriage was void ab initio, because the relationship of the second wife to the first had been proved. And when a marriage is void ab initio, the relation of husband and wife, which is the foundation of the jurisdiction to grant alimony, has never in law existed: *Whitmore* v. *Whitmore* (1); *Noblett* v. *Noblett* (2); *Blackmore* v. *Mills* (3). It is not like a voidable marriage. The learned President relied on *Bird* v. *Bird* (4) and *Miles* v. *Chilton* (5); but *Blackmore* v. *Mills* (3), a much more recent decision, is opposed to those cases. *Langworthy* v. *Langworthy* (6) is distinguishable from the present case. There the suit was by the wife for restitution of conjugal rights, and the husband had untruly alleged that no ceremony of marriage had taken place between himself and the petitioner.

The basis of the doctrine of alimony is, first, that the woman is without the means of maintaining herself pendente lite; second,

(1) Law Rep. 1 P. & D. 96.
(2) Law Rep. 1 P. & D. 651.
(3) 16 W. R. 893; 18 L. T. (N.S.) 586.
(4) 1 Lee, 209, 418.
(5) 1 Rob. 684.
(6) 11 P. D. 85.

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that the husband has become possessed of the wife's property jure mariti; third, that the woman is the true wife of the man. None of those conditions exist in the present case. The delay in making the application shews that the petitioner is not without means, and the second condition has no existence since the Married Women's Property Act. The third condition was disproved when the decree nisi was made.

Even if the jurisdiction exists, no case has been shewn for its exercise. The delay in making the application is a sufficient answer to it. The delay of the husband in applying to have the decree made absolute is explained by the fact that his solicitor had died, and he supposed that there was nothing more to be done.

At any rate, alimony should be granted only from the date of the application; not from the date of service of the citation upon the wife.

Bayford, Q.C., and *R. H. Pritchard*, for the respondent, were not called upon.

LORD HERSCHELL, L.C. (after stating the facts as above), continued. It was contended, first, that the Court had no jurisdiction to make the order; and, secondly that, if there were jurisdiction, it was not a proper case for its exercise. First of all, it was said that there was no pending suit, because a decree nisi had been made. That argument is, in my opinion, quite untenable. Till the decree nisi has been made absolute, the suit is clearly pending. Then it was said that, so soon as the fact of the alleged wife's relationship to the former wife had been established to the satisfaction of the Court, the Court was not within its jurisdiction in making an order for alimony, and in support of this some observations of Lord Penzance in *Blackmore* v. *Mills* (1) were relied upon. Under the circumstances of that case it may have been quite right to refuse to grant alimony. But I do not think Lord Penzance meant to lay down that the Court had no jurisdiction to grant alimony in a suit for nullity on the ground that the marriage was void ab initio; if he did, I cannot agree with him. In *Bird* v. *Bird* (2), in 1753,

(1) 13 W. R. 893. (2) 1 Lee, 209.

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Sir G. Lee, the then judge of the Court of Arches, in a suit for nullity of marriage, brought by the husband on the ground that at the time of the marriage the wife had another husband living, a de facto marriage being admitted, held that the husband must bear the expenses of the wife. Sir G. Lee said that, as there was no precedent, he must determine the case upon the general principles of law and reason. And he added, "I must presume, till the contrary appeared in evidence, that she was his wife de jure, as well as de facto, for otherwise she must be guilty of bigamy, and is a felon by statute of Jac. 1; but the law presumes, on the contrary, everybody to be innocent till they are proved guilty. I must, therefore, suppose her at present to be his lawful wife, and as such entitled to have costs, as she prays to defend herself in this suit." That was, no doubt, the first decision of the kind. But it appears to have been afterwards the settled practice of the Ecclesiastical Courts to grant alimony to a wife pending suit in all cases of this kind, unless there was some special reason to the contrary. This is shewn by a note of Dr. Joseph Phillimore's in his edition, published in 1833, of Lee's Reports, at p. 211, in which he says: "In all matrimonial causes where a fact of marriage is established, and the parties have not separate incomes, the husband is liable during the progress of the cause to pay for the maintenance of his wife and the costs of the suit." There is nothing to shew that this practice has not continued down to recent times. In my opinion, the practice is in accordance with reason and good sense, and, if it had not already existed, I should have been inclined to originate it. I cannot, therefore, hold that there was no jurisdiction to make the order. It was, however, urged that the wife did not make her application until long after the decree nisi. But it must be remembered that the husband did not apply till long after that decree to have it made absolute. Under the circumstances, I am not disposed to interfere with the exercise of discretion by the learned President. If the jurisdiction exists, it is a mere matter of discretion whether it shall be exercised. There are obvious reasons why an alleged wife should receive maintenance from her husband until her status has been finally determined by the decree of the Court. The appeal must be dismissed.

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LINDLEY, L.J. I am entirely of the same opinion. The important question is that of jurisdiction. A difficulty seems to have been felt in the first instance as to the power to grant alimony in a suit of this kind. But the difficulty was surmounted in 1753 in *Bird* v. *Bird* (1), and ever since then the jurisdiction has been admitted. I do not think that Lord Penzance in *Blackmore* v. *Mills* (2) intended to throw any doubt upon the jurisdiction. The same practice has remained in force since the Divorce Act of 1857, and I think we ought not now to unsettle it. It is not founded upon any particular provision in the Act, but upon the old practice of the Ecclesiastical Courts.

Upon the question of discretion, I think we ought not to interfere with the order of the learned President. It is the ordinary practice to direct that alimony should be paid from the date of citation. No injustice can result from the order.

DAVEY, L.J. In my opinion, there was jurisdiction to make the order, and I am not prepared to say that the discretion has been wrongly exercised. I cannot regard the observations of Lord Penzance in *Blackmore* v. *Mills* (2) as laying down an absolute rule which would deprive the Court of a discretion to grant alimony in such cases.

Appeal dismissed.

Solicitors: *Aldis, for Stanley R. Preston, Stratford; A. S. C. Doyle.*

(1) 1 Lee, 209.

(2) 16 W. R. 893.

W. L. C.

[IN THE COURT OF APPEAL.]

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April 11.

HANBURY *v.* HANBURY.

Divorce—Alimony—Permanent Maintenance—Income of Respondent—Profits of Partnership Business—Undrawn Profits—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

Upon an application after a decree for dissolution of marriage for an order under s. 32 of the Matrimonial Causes Act, 1857, that the husband should secure to the wife an annual sum of money, it appeared that he was partner in a brewery, and was entitled to receive 200*l.* per month in respect of his share of the profits, but could not draw anything more without the consent of his partner. His share of the profits had for several years past amounted to about 3300*l.* a year, but he had received only the monthly allowance amounting to 2400*l.* a year, the rest being carried to his credit in the partnership books:—

Held (reversing the decision of the President), that, for the purpose of determining the amount of the annual payment to be secured to the wife, the husband must be treated as having only an income of 2400*l.*

THIS was an appeal from an order of the President of the Probate and Divorce Division (ante, p. 102), directing the respondent to secure to the petitioner during her life, or until she married, the yearly sum of 600*l.*, in addition to the yearly sum of 500*l.* already secured to her by a settlement executed by the respondent.

The respondent was a partner in a brewery, his capital in which was 15,000*l.* The articles provided that each partner might draw out of the profits a certain sum per month, to be refunded if at the end of the year his share of the profits did not amount to such sum. The respondent was entitled under this provision to 200*l.* per month. The 18th clause was as follows:—

"The amounts due to the partners respectively in respect of profits as aforesaid, after allowing for the sums drawn out respectively by them as aforesaid, shall be paid to them respectively immediately after the net profits for each year shall have been ascertained: Provided that neither partner shall at any one time be entitled to require payment of such an amount as not to leave a balance to the credit of the partnership at their bankers

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sufficient in the judgment of the other partner to answer the impending current expenses of the partnership business."

The deed provided that "no partner shall enter into any bond or become surety or surety with or for any person, or subscribe any policy of insurance," and that "no partner shall do or willingly suffer anything whereby or by means whereof the stock-in-trade, capital, or property of the partnership may be seized, attached, or taken in execution."

The respondent's share of the profits (subject to a deduction for capital withdrawn) had for several years been about 3300*l.* a year, but he had only received the monthly allowance amounting to 2400*l.* a year, and there was standing to his credit about 3500*l.* of undrawn profits. His age was between forty and fifty, and his health was delicate, so as to raise some doubt whether he would be able to continue in the business.

The registrar proposed that the petitioner should have 800*l.* a year in all, including the 500*l.* a year which had been already secured to her. The President considered that the respondent's income was to be reckoned at 3300*l.*, and that the wife ought to have 1100*l.* in all. He therefore ordered the respondent to secure 600*l.* in addition to the 500*l.* already secured to her (1).

The respondent appealed.

Bayford, Q.C., and *Barnard*, for the respondent. The Matrimonial Causes Act, 1857, s. 32, contemplates a charge on the husband's property; but the profits of a man's business cannot be considered as property within the meaning of this enactment. No effectual charge can be made; for if it were enforced by execution the partnership would be dissolved, and the respondent would receive about 20,000*l.*, the income of which would be insufficient to meet the annual payment ordered. An order under this Act is final, and cannot be varied: *Benyon* v. *Benyon*. (2) An order under the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), can be varied, and an order, if made at all, should be made under that Act.

Inderwick, Q.C., and *Bargrave Deane*, for the petitioner. The Act of 1866 only provides for orders during the joint lives of

(1) Ante, p. 102. (2) 15 P. D. 29, 54.

husband and wife, and it is not applicable to the present case. It only applies to cases where there is no property: *Medley* v. *Medley* (1); and it is absurd to say that a man with 20,000*l.* in a business has no property. There is nothing to prevent the Court from making, under s. 32 of the Act of 1857, any order applicable to the circumstances of the case.

[KAY, L.J. Why might not an order be made under the Act of 1857 for such an allowance as he can secure, and an order under the Act of 1866 for what he has no means of securing?]

[*Bayford, Q.C.*, for the respondent. In *Medley* v. *Medley* (2) it is said that you must proceed under one statute or the other.]

The respondent suggests that the security would be such a charge on the business as would create a dissolution of the partnership; but the petitioner might be satisfied with the security of a covenant.

[LINDLEY, L.J. I doubt whether a covenant is a security.

KAY, L.J. I think it is not a security unless there is a surety.]

A warrant of attorney was given as security in *De Stern* v. *De Stern*, reported in a note to *Morris* v. *Morris*. (3)

[LINDLEY, L.J. The security will have to be settled by the conveyancing counsel of the Court, and the propriety of the form of security is best dealt with at that stage.]

Then, as to the amount to be secured, it may be that the husband can at present only get 2400*l.* a year, but an additional sum will be stored up for him out of the profits, and property not producing present income is taken into account in fixing alimony: *Crampton* v. *Crampton*. (4)

Bayford, Q.C., declined to reply on the question of security.

LINDLEY, L.J. This is an appeal from an order of the President of the Probate and Divorce Division directing the respondent to secure, in addition to the 500*l.* a year already secured, the annual sum of 600*l.* for the term of the petitioner's life or until she marries, and for that purpose it is to be referred

(1) 7 P. D. 122.
(2) 7 P. D. 122, at p. 125.
(3) 31 L. J. (P. & M.) 33.
(4) 32 L. J. (P. M. & A.) 142.

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to one of the conveyancing counsel to settle the deed. The learned judge proceeded upon the theory that this gentleman's income under the partnership articles amounts to 3300*l.* a year. In one sense it does, because the annual profits for the last three or four years have amounted to that sum; but then under the partnership articles, and especially under clause 18, it is obvious that he cannot draw more than 2400*l.* a year without the consent of his co-partner. The clause does not in terms say that; but it says that the co-partner may object to his withdrawing more, if in his judgment the necessities of the business render it undesirable to draw more. Practically it comes to this, that the respondent cannot get in respect of his annual profits more than 200*l.* a month without the consent of his co-partner.

Under those circumstances it strikes us that the learned judge ought not to have considered his available income as more than 2400*l.* Then there is this circumstance also, that in consequence of the state of health of the respondent it is quite possible that this partnership may be dissolved before his death, and if so an order that he should pay as much as 1100*l.* permanently to the wife for life might be very onerous indeed. It might amount to the whole income to which he is entitled, and under the Act of Parliament under which this order is made, he could not get a reduction in the amount ordered to be paid.

Under those circumstances we think it will be right to substitute the annual sum of 300*l.* for the annual sum of 600*l.*, and then leave the conveyancing counsel of the Court to exercise his ingenuity to devise the best security which he can, having regard of course to the terms of the partnership articles.

That disposes of everything except the costs, and this being a case between husband and wife, the husband must pay them.

LOPES, L.J. I think the learned President has formed too high an estimate of the income of the respondent, the husband in this case. He has come to the conclusion that there is an available income practically of 3300*l.* a year. I think that conclusion cannot be properly arrived at, because anything beyond the 2400*l.* a year appears to me to be extremely uncertain, depending upon the action of the co-partner. I think the proper

amount to take is an available income of 2400*l.* a year. It may be that in some years the husband would receive considerably more than that; but circumstances may occur so that not only would he not receive that amount, but through fluctuations of business he might not even receive the 2400*l.* a year. Therefore, I think it fair to take the income at 2400*l.* a year. It is to be borne in mind that this order is a final order which cannot be altered, but will last during the life of the husband. I must say I am very much influenced in the decision at which I have arrived by the fact that, having regard to the health of the husband and the other circumstances, it may be that he may no longer be able to continue a partner in this firm; and under those circumstances the husband would only be entitled to an amount of capital the income of which would be scarcely sufficient to enable him to pay even the amount which we now think ought to be paid.

The conclusion I arrive at is this, that the sum of 300*l.*, instead of 600*l.* as directed by the President, should be secured under s. 32 of the Matrimonial Causes Act, 1857; and with regard to the costs, this being a matter of an application by the husband against the wife, I think the ordinary rule ought to be followed, and that the appellant should pay the costs of this application.

KAY, L.J. I agree.

Appeal allowed.

Solicitors for petitioner: *Routh, Stacey, & Castle.*
Solicitors for respondent: *Hanbury, Hutton, & Whitting.*

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Admiralty—Insurance (Marine)—Freight—Valued Policy.

The plaintiffs, whilst their vessel was on her way to New Orleans, and in anticipation of a full homeward cargo, effected a policy of insurance with the defendants for 1500*l.* upon "freight valued at 5500*l.*" "at and from New Orleans to Liverpool," the insurance to commence from the loading of the cargo.

At the date of the policy this valuation was reasonable and proper upon a full cargo, having regard to the rates of freight then current at New Orleans and to the engagements of cargo for the vessel; but on her way out she met with an accident, and during the time occupied in repairs the rates of freight at New Orleans declined considerably, and the greater part of the engagements of cargo had to be cancelled. After some months' delay the vessel sailed for Liverpool with a full cargo, the total freight on which amounted to 3250*l.*, of which 952*l.* was paid in advance. In the course of the voyage the vessel was lost by a peril insured against, and the total freight at risk, 2298*l.*, also lost. The plaintiffs collected under other policies the sum of 3250*l.*, and in an action against the defendants claimed 1500*l.* from them.

The defendants contended that the valuation must be opened, and that, on the actual amount of freight at risk, the plaintiffs had been fully indemnified under other policies:—

Held, by Gorell Barnes, J., that the valuation was binding; but as freight to the amount of 952*l.* had been paid in advance, and was, therefore, not at risk, the valuation of 5500*l.* must be reduced by 1611*l.*, being the proportion of the prepaid freight to the gross freight, leaving 3889*l.* as the value at risk, and as, of this sum, the plaintiffs had received 3250*l.*, the amount recoverable from the defendants was 639*l.* with a small proportionate return of premium.

Forbes v. *Aspinall* (13 East, 323), distinguished.

ACTION by plaintiffs, the Anglo-American Steamship Company, Limited, owners of the steamship *Main*, to recover from the defendants, the National Marine Insurance Association, Limited, a loss under a marine policy of insurance on freight.

The material facts were:—

On October 9, 1891, the *Main* left Hamburg for New Orleans, and, on November 18, the plaintiffs effected, with the defendants, a marine policy of insurance, whereby, in consideration of one per cent., the defendants insured against all loss and damage by (inter alia) perils of the sea and fire, the sum of 1500*l.* upon "freight valued at 5500*l.*" in the vessel "at and from New Orleans to Liverpool . . . . the insurance to commence upon the

freight . . . . from the loading of the . . . . goods on board the ship."

At the date of the policy the valuation of the expected freight at 5500*l.*, upon a full cargo, was reasonable and proper, having regard to the rates then current at New Orleans for the voyage in question, and having regard to the very large portion of her cargo which had been engaged by the representative of the owners of the vessel in contemplation of loading her in due course; but, three weeks previously (October 28), the *Main* had grounded off the coast of Florida, and it was not until December 1 that she was towed into New Orleans. By December 21 her inward cargo was discharged, and she was shifted to a loading berth, but considerable repairs were required, involving so much delay, that only a part of her cargo (consisting of 12,042 bushels of corn, 700 barrels of molasses, and 7080 staves) was loaded at the original rate, the remainder of the engagements for cargo (principally consisting of 5000 bales of cotton at 21/64*d.* per lb.) being cancelled, as the shippers could not wait.

On March 1, 1892, the *Main* left New Orleans for Liverpool with a full cargo (principally consisting of 4097 bales of cotton at 5/32*d.* per lb.), but the rates of freight (with the exception of that on the portion of the original cargo) being so much lower than those current when the policy was effected, the total amount of freight only reached 3250*l.* 7*s.*, of which 952*l.* 3*s.* 9*d.* was paid at New Orleans in advance on the shipment of the molasses (282*l.* 18*s.* 4*d.*) and cattle on deck (669*l.* 5*s.* 5*d.*).

In the course of the homeward voyage the vessel was lost by one of the perils insured against, viz., fire, and thereby the freight at risk, amounting to 2298*l.* 3*s.* 3*d.*, was also lost.

Of this sum the plaintiffs collected 2250*l.* under a policy with a German marine insurance company for 2500*l.*, and 1000*l.* under a policy with another company for that amount, making together 3250*l.*, and the plaintiffs now claimed 1500*l.* in the present action.

The defendants alleged that the cargo for the carriage of which the freight was expected to be earned was never shipped, that the freight insured was never at risk, that the policy never attached, and they paid the premium of 15*l.* into court; but

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substantially the defence relied upon was that the valuation must be opened for—

(Par. 5.) "Of the freight valued at 5500*l.* agreed to be insured by the alleged policy only a portion amounting to 2800*l.*, or thereabouts, and no more was ever at risk under the policy or was ever lost upon the voyage insured. The cargo shipped was shipped at lower rates of freight than had been intended when the policy was made, amounting in all to, and not more than, 3250*l.* 7*s.*, and of this 952*l.* or thereabouts was paid to the plaintiffs in advance and was not at risk."

(Par. 6.) "Before the commencement of this action the plaintiffs had been paid under other policies of insurance effected by them upon the freight at risk, upon the said voyage, sums amounting to more than 3250*l.*, and have thereby been fully indemnified against the loss of freight sustained by them."

Joseph Walton, Q.C., and *W. F. Taylor*, for the plaintiffs.

Sir Walter Phillimore, and *Carver*, for the defendants.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned the following were referred to: *Ionides* v. *Pender* (1); *Tobin* v. *Harford*. (2)

GORELL BARNES, J. (after dealing with the facts of the case, proceeded). The substantial point raised before me, apart from a subsidiary point as to amount, involves chiefly this question, whether the plaintiffs can recover on the footing of the valuation in the policy effected by them with the defendants, or whether that valuation can be opened so as to entitle the plaintiffs only to recover upon the footing of what actually was at risk, with the result that in consequence of the payments already made to the plaintiffs they will have been fully indemnified for what was at risk, and therefore recover nothing on the policy.

In order to arrive at a solution of that question, I have to consider, first, whether the policy attached to and covered the freight on this voyage. The plaintiffs say it did, and that that being so the valuation applied to what was at risk on that voyage and is binding on the parties. And notwithstanding what is set

(1) Law Rep. 9 Q. B. 531. (2) 34 L. J. (N.S.) C. P. 37.

up in the defence, I do not think it was really disputed that the policy in fact attached upon this voyage to the freight which was at risk. The real contention raised by the defendants is that this valuation must be opened. Now, what was it that was valued in the policy? By the agreement of the parties it is freight valued at 5500*l.* in the *Main* on a voyage from New Orleans to Liverpool. I think the freight so valued meant the gross freight of the ship. The underwriters do not seem to have been told that some might be paid in advance, and, although there was a letter from New Orleans, from which it might perhaps have been inferred that the assured in taking out a policy meant to exclude the advanced freight, I do not think, looking at the facts, that they intended when they took the policy out, or that the underwriters assented to or agreed, that what was valued was other than the gross freight for the voyage.

The defendants, however, say that that valuation was made upon the basis of the current rates at which the ship was practically engaged, and that, as much less was ultimately obtained. the valuation should be opened, and be treated as being at a reduced rate.

The plaintiffs, on the other hand, contend that the value agreed in the policy is the value agreed by both parties to represent the value of what actually was at risk on the voyage; and in support of that view they rely upon *Everth* v. *Smith* (1), which they say shews, that although the assured may take out a policy on freight generally with regard to what they then think will be the engagement of the ship, that policy will cover and attach to whatever is in fact freight on the voyage on which the ship sails, and I was referred to the following passage in the judgment of Lord Ellenborough (2): "This was an insurance on freight generally, not on any specific freight; the charterparty is only material to shew that upon the ship's arrival at Riga there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any 'freight' is brought home, a loss has not happened for which he undertook to indemnify the assured." In that case there had been freight earned and therefore there had been no loss. At the close of his judgment

(1) 2 M. & S. 278.

(2) 2 M. & S. 278, at p. 284.

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he says (1): "On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured or a posterior freight makes no difference; if freight has been fully earned there can be no loss properly demandable of the underwriters." It is clear that the Court held that, in a policy in similar terms, the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms.

I think, therefore, the policy in this case undoubtedly attached to the subject-matter at risk, and I now proceed to deal with the defendants' contention that the policy should be opened, and consequently, that there ought to be a reduction, based upon what was in fact at risk, and not upon the valuation. In support of this contention, the defendants rely upon *Forbes* v. *Aspinall* (2); but that case is only an authority for a very well-known proposition, viz., that where both parties contemplate the freight insured to be on a full and complete cargo, and when, in fact, part cargo only is shipped, the freight on the part cargo is all that is at risk, so that there must be what is called an opening of the valuation. In strictness, it is not an opening of the valuation, but is merely a reduction in proportion to the amount of cargo shipped, the valuation still being held binding as a valuation on that portion which is shipped.

I think if the judgment in that case is looked at carefully, it will be seen to be based on the principle that both parties had agreed that the freight which was valued was the freight on a full and complete cargo, and that, as this full and complete cargo was not shipped, but only part shipped, the value of what was at risk must be taken in proportion to the whole cargo, and that applied to the actual valuation agreed upon. That case is no authority for the contention that if the value of what is about

(1) 2 M. & S. 278, at p. 286. (2) 13 East, 323.

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to be shipped, or the value of the freight on what is about to be shipped, is estimated too highly originally, and the assured is mistaken in his valuation, the valuation ought to be reduced. The truth seems to me to be that, with regard to that case, which is referred to throughout the whole of the text-writers, and with regard to other cases of a similar kind, the freight upon what is not shipped is never at risk, and, therefore, to that extent the underwriters cannot be made responsible.

There are several cases which seem to me to be in point in dealing with this particular question, though they were not cited before me. For instance, one of the points put in argument by counsel for the defendants was, that if a cargo was about to be shipped under a policy in general terms on produce, and the assured could not ship as valuable a cargo as he at first intended, and shipped a cargo of much less value, then the valuation would not be binding. The plaintiffs contended that it still would be binding.

There is a case cited by the text-writers precisely on this point. It is referred to by Lowndes in his book on Insurance, 2nd edit. (sect. 32) thus: "But, excluding fraud and mistake, a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, valuing it at 11,000*l.*, and by chance she was loaded with palm kernels, worth only some 3000*l.*, which were totally lost on the way home, he was allowed to recover the whole of the 11,000*l.*" The reference he gives is *Company of African Merchants* v. *Liverpool Marine Insurance Co.* (1) I am not sure that the case quite bears out the statement made by the learned author; but M'Arthur in his book on Insurance (2) cites (in support of the same proposition as Lowndes) the case as *Company of African Merchants* v. *Harper* in 1872, giving the same reference, and adding that the case is not reported, though I think that the case mentioned in the *Shipping Gazette* of December 2, 1872, is another case. (3)

(1) Mitchell's Maritime Register, vol. 15, p. 914; vol. 16, p. 145.

(2) 2nd edit. p. 70.

(3) In Maritime Notes and Queries (edited by Sir William Mitchell, part 4, December, 1873, p. 222, 2nd col.),

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Upon the question of valuation there are two cases in the authorized reports which seem in point. The first is *Lidgett* v. *Secretan* (1), where a ship was insured, valued at 20,000*l*., at and from London to Calcutta, and for thirty days after arrival, and then another policy was taken out for 10,000*l*., at and from Calcutta to London. The ship was considerably damaged on the outward voyage, and was put into a dry dock for repair. While being repaired the outward policy expired, and she was afterwards totally destroyed by fire, whilst she was still in a damaged condition and only partially repaired. It was held there that, under the first policy, the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk, in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that, under the second policy, the assured were entitled to recover as for a total loss; so that, although the valuation had been made on the basis of her being a sound ship under the second policy, and, in fact, she was a damaged ship worth much less, the assured recovered the full amount under the second policy. Willes, J., said (2): "The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies, which has been recognised and adopted by shipowners and underwriters, and has, at least amongst honest men,

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appears the following: "Insurable value":—

"If an underwriter takes a premium on a valued policy he must stand by his loss, whether the interest is undervalued or overvalued. In the *Shipping and Mercantile Gazette* of the 2nd of December, 1872, will be found the case of the *African Company* v. *Harper*. Lord Chief Justice Cockburn in that case said: 'If underwriters insure a ship and cargo for 13,000*l*., which in the event of disaster may only sell for 45*l*., they chose to take the insurance at so much, and it is their fault if it turns out that they were overvalued. No doubt those valued policies afford an encouragement to fraud; but where there is no fraud proved, the underwriters cannot re-open the valuation, and they must suffer.' Mr. Justice Blackburn confirmed these views, and stated that the House of Lords had decided that, on a valued policy, the valuation could not be disputed except in case of fraud."

(1) Law Rep. 6 C. P. 616.

(2) Law Rep. 6 C. P. 616, at p. 627.

the advantage of giving the assured the full value of the thing insured, and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would, in the end, as it seems to me, prove highly detrimental to the interests of the underwriters . . . It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time have sustained damage even to the extent of what may ultimately turn out to be a total loss; that being in fact one of the perils insured against." Then he refers to the case of *Barker* v. *Janson* (1) and says: "The result of the decisions in this country, as well as in the United States, and, I believe, in North Germany, is, that the value mentioned in the policy is a conventional sum, not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss." Then he refers to the contention on the part of the defendants, and adds: "No authority has been cited for limiting the value to that extent. In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time." And Montague Smith, J., says (2): "If the repairs had been completed before the second policy attached, the vessel would have been of the value mentioned in that policy; but that is a fact with which the underwriters on that policy are not concerned, because value is a matter which the parties have liquidated and ascertained at the time of entering into the contract, and which neither can open. It cannot depend on the actual value at the time of the loss, or at the time the risk attaches."

The case of *Barker* v. *Janson* (1), referred to by Willes, J., is still more striking. There the ship was insured on a valued time policy—in the last case I mentioned it was on a voyage policy homeward—and its value stated in the policy was 8000*l*. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the

(1) Law Rep. 3 C. P. 303. (2) Law Rep. 6 C. P. 616, at p. 631.

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repairs would have exceeded its value when repaired; the ship was therefore not worth anything. During the continuance of the risk the ship was totally lost. It was held that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the value of the ship as stated in the policy was still conclusive between the parties. Willes, J., in giving judgment, said (1): "No authority has been cited for it (that is, for deduction), and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to reopen a contract of valuation must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract." And in conclusion he says (2): "In fine, as pointed out by Patteson, J., in *Irving* v. *Manning* (3), so long as underwriters are willing to adhere to the system of valued policies, they must, where there has been no fraud, pay the stipulated amount."

These cases seem to me to be authorities for the proposition that, though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be erroneous, because of facts of which he had no knowledge at the time when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive and binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy.

I therefore hold that the plaintiffs are right in maintaining that the policy covered the freight at risk on the voyage in question, and that the valuation is binding on both parties with regard to what actually came at risk under the policy, and that amount is 5500*l.*

The subordinate question in the case is: what amount the plaintiffs are entitled to recover? A sum of 952*l.* 3*s.* 9*d.* was

(1) Law Rep. 3 C. P. 303, at p. 306. (2) Law Rep. 3 C. P. 303, at p. 307.
(3) 1 H. L. C. 287.

paid in respect of freight before the ship sailed. It was paid, according to the admission of the parties, on the shipment of the goods to which the policy related and, therefore, that sum never came at risk upon the policy. The result is that that sum, out of the sum of 3250*l.* 7*s.*, was not at risk, and therefore the valuation of 5500*l.* must be reduced in proportion to the rule-of-three sum arrived at by the relationship of 952*l.* to 3250*l.*, as stated in the judgment of *Williams* v. *North China Insurance Co.* (1), and in the other cases cited. That, I understand from counsel it is agreed, would leave the sum of 3889*l.*, as being the value of what was at risk, taking the valuation in the policy during this voyage, and as the sum of 3250*l.* has already been paid by other underwriters, the amount which is recoverable from the present defendants will be reduced to 639*l.* That figure, if my view of this case is correct—and subject to the premium of 15*l.* paid into Court, and to the small addition of 4*l.* 7*s.* 6*d.* by way of return of a proportionate part of that premium—is the amount for which the parties are agreed judgment must be entered.

Judgment for plaintiffs for 643*l.* 7*s.* 6*d.* (*less amount paid into Court*) *and costs.*

Solicitors for plaintiffs: *Walker, Son, & Field, for Weightman, Pedder & Co., Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

(1) 1 C. P. D. 757.

T. L. M.

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June 25;
July 2.

THE GEORG.

Admiralty—Salvage—Appraisement—Awards to Salvors absorbing whole Proceeds—Application to vary Decree.

In an action of salvage the plaintiffs obtained an award of 1500*l.* upon an appraised value of the defendants' ship of 1250*l.*, and of her cargo of 5004*l.*: total, 6254*l.*

The ship was subsequently sold by the marshal for 713*l.*, the cargo, which was of a nature not readily saleable in this country, for 1649*l.*, and the total 2362*l.* was reduced by fees and disbursements to 1625*l.* An award of 130*l.* obtained by the pilot and 100*l.* by boatmen in separate actions in respect of the same salvage operations brought the total salvage claims up to 1730*l.*, which more than absorbed the whole proceeds.

On motion by the defendants to vary the decree by reducing the award of 1500*l.*:—

Held, by Bruce, J., that the application must be refused, as the defendants had allowed the Court to proceed to award salvage upon the basis of the appraisement without taking any exception at the time, and, beyond the difference between the appraised value and the sum realized by the sale, there was nothing to indicate that the appraisement did not fairly represent the value at the time and place when the property was brought into safety.

Motion by the defendants, the owners of the German ship *Georg*, and the owners of her cargo, to vary the decree, and reduce the award in a salvage action on the ground that the value ascertained by appraisement was erroneous.

The facts giving rise to the application were shortly as follows:—

On January 1, 1894, the *Georg*, of 1195 tons register, from Bremen to New York, came into collision, in the North Sea, with the steamship *Oberon*, and sustained damage. She was towed to Dover, where she encountered heavy weather. To prevent her drifting, in her disabled condition, on to the Admiralty Pier, she was taken in tow by two tugs, the *Challenge* and the *Granville*, and, with considerable difficulty, brought into the Solent.

On January 2, an action of damage by collision was commenced by the owners of the *Oberon* against the owners of the *Georg*. On January 30, Gorell Barnes, J., made a decree finding the *Georg*

alone to blame, and the damages were subsequently assessed at 303*l.* 18*s.* 6*d.*, with costs.

On January 5 and 6 respectively the owners of the tug *Challenge*, and the owners of the tug *Granville*, commenced actions of salvage against the owners of the *Georg*, her cargo and freight. The vessel was arrested with her cargo, the actions were consolidated, and affidavits were filed by the defendants putting the value of the ship at 1000*l.*, and her cargo at 4167*l.* 6*s.* The plaintiffs not accepting these values, the marshal on January 20 appraised the vessel at 1250*l.*, and the cargo, on January 24, at 5004*l.*

On February 3, on the basis of the marshal's appraisement—that is, that the total amount at risk and saved by the salvors was 6254*l.*—Gorell Barnes, J., made a decree awarding the sum of 750*l.* to each of the two tugs, making a total of 1500*l.* with costs.

On April 24, in an action of salvage by default, the President (Sir F. H. Jeune) awarded the pilot, who boarded the *Georg* at Dover, and sustained injuries during the gale, the sum of 130*l.*, the values being based on a statement made by the marshal in court that no purchaser could be found to bid up to the reserve of 700*l.* for the ship, and that the cargo had been practically sold for about 1500*l.* Another set of salvors (boatmen) obtained an award of 100*l.* in the Southampton County Court on the basis of the appraised value, making the total salvage awards 1730*l.*

On May 17, for the purposes of execution, the vessel was sold by the marshal for 713*l.* 10*s.*, from which a sum had to be deducted of 278*l.* 4*s.* 3*d.* for fees and disbursements (1), leaving the net proceeds 435*l.* 5*s.* 9*d.* The cargo, consisting principally of grain bags, was also sold by him in several parcels in March, April, and June for 1649*l.* 1*s.* 8*d.*, the expenses (2) being 459*l.*, leaving the net proceeds 1190*l.* 1*s.* 8*d.*, or a total of 1625*l.* 7*s.* 5*d.*

(1) The ship having been a long time under arrest, the dock charges and tonnage dues exceeded 167*l.*

(2) The warehouse rent, and charges connected therewith, exceeded 169*l.*

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Aspinall, Q.C., and *Stubbs*, for the owners of the *Georg*, and the owners of her cargo. The net proceeds of the sale of the ship and cargo are insufficient to satisfy the salvage claims, apart from the liability of the ship to the owners of the *Oberon* as damage claimants.

It is evident from the figures that Gorell Barnes, J., estimated that his award would only absorb about one-fourth of the value; but in the result the owners of the *Georg*, and the owners of her cargo (who are innocent parties), have been deprived of the whole of their property. No salvage award has ever gone this length; for where the property is not derelict, a moiety has never been exceeded.

The largeness of the award arose out of the mistaken appraisement of the marshal as shewn by the sums realized by the sale. The mistake having been made by an officer of the Court, the Court can rectify it. In *The Markland* (1) it was laid down that the Court had power, before payment out of court of proceeds, to vary a decree made per incuriam, and in *The James Armstrong* (2) the Court altered its decree in a salvage suit on a mistake in value being proved.

Butler Aspinall, for the owners of the *Oberon*, supported the defendants' application.

F. W. Raikes, Q.C., for the plaintiffs, the principal salvors. No ground has been shewn for interfering with the award, which was properly made upon the materials then before the Court. A subsequent forced sale is no proof that the estimated value of the property to the parties, at the time it was brought into safety by the salvors, was incorrect. In *The Cargo ex Venus* (3) the appraisement made by the marshal of the Court was held to be conclusive, although the cargo realized considerably less. The fact that there is a damage claimant does not affect the question, as the salvage, though later in date, takes priority. There has also been delay in making this application, which would prevent the Court acceding to it, even if it were well founded: *The Monarch.* (4)

(1) Law Rep. 3 A. & E. 340.
(2) Law Rep. 4 A. & E. 380.
(3) Law Rep. 1 A. & E. 50.
(4) 1 Wm. Rob. 21.

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Aspinall, Q.C., in reply. The salvors are only entitled, as against the cargo, to salvage on its value at Southampton, a place which was not the port of destination, and where there was no market. A question of this sort arose in *The George Dean* (1); but there the cargo was transshipped from Lisbon, to which place the salvors had taken it, and where there was no market, and taken to the port of destination—London—where it was sold, the selling price forming a basis on which the value at Lisbon could be calculated. Here, however, there were no such materials, and the marshal has miscalculated the value, as subsequently tested by the selling price. In *The Cargo ex Venus* (2) Dr. Lushington said that it would be imprudent on the part of the Court to allow an appraisement made under its authority to be departed from "unless under extraordinary circumstances." The circumstances here are extraordinary, and the charge of delay in making the application is not well founded, as the final result of the sales by the marshal was only very recently known.

Cur. adv. vult.

July 2. BRUCE, J. This is an action of salvage, in which Gorell Barnes, J., awarded to the plaintiffs 1500*l.* and taxed costs. I am now asked to vary this decree, on the ground that it was made upon a mistaken appraisement of the values of the property by the marshal.

There are authorities which establish the power ot the Court to rehear causes, and, in its discretion, to vary its decrees in cases where it has proceeded upon a mistake: *The Monarch* (3); *The Markland* (4); *The James Armstrong* (5); but this power ought to be exercised rarely and with great caution, for otherwise much inconvenience and uncertainty would ensue. [The learned judge then dealt with the figures as to the appraisement and the sale, and continued:—] Beyond the discrepancy between the figures of the appraisement and the proceeds of the sale, there is nothing in the case before me to point to any

(1) Sw. 290.
(2) Law Rep. 1 A. & E. 50.
(3) 1 Wm. Rob. 21.
(4) Law Rep. 3 A. & E. 340.
(5) Law Rep. 4 A. & E. 380.

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mistake in the appraisement. The defendants allowed the Court to proceed to judgment on the appraisement without taking any exception to it, and without making any application to have the value of the property ascertained by sale. They filed affidavits of value, in which, although the total is less than the appraisement of the marshal, it is yet very much greater than the amount which was realized by the sale. Beyond a statement made in the affidavit filed in support of the present motion—that the affidavit of value was made upon the basis of the invoice value of the cargo—there is no suggestion that any mistake was made in estimating the value of the cargo, and there is nothing to indicate that the appraisement made by the marshal did not fairly represent the value of the cargo at the time and place when it was brought into safety. The cargo consisted chiefly of bags, which had been shipped on board the defendants' vessel at Bremen for a port in the United States. The bags were of the kind commonly used for the stowage of grain, and, no doubt, if the vessel had arrived safely in the United States, or if a sale of the bags could have been effected at a port where grain is an article of export, they would have realized a comparatively high value; and if, in estimating the value of the bags to the defendants, the marshal took into consideration the opportunity the defendants had of disposing of the bags at a profit at the port of destination, and the cost to be incurred in carrying them to the port of destination upon the principle indicated by Dr. Lushington in the case of *The George Dean* (1), I cannot say that he made any mistake in the appraisement; but it is enough that there is no evidence to shew that there was any mistake or error in the appraisement.

It is said that if the sale had taken place before the award of salvage, Gorell Barnes, J., would have taken the value realized by the sale as the value on which to base his award. But it seems to me to be clear that where the defendants have allowed the Court to proceed to award salvage upon the appraisement, they cannot call upon the Court to vary the decree merely because since the decree it has been found for some reason which is not explained that the property has been sold at much less

(1) Sw. 290, at p. 291.

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than the appraised value. In the case of *The Cargo ex Venus* (1) Dr. Lushington held the appraisement to be conclusive, notwithstanding that the sum actually realized by the sale was less than the appraised value, and if after proceedings have been regularly taken, and judgment pronounced in the ordinary course, it were to be open to parties on facts happening after the judgment to reopen the whole case, the greatest confusion and uncertainty would prevail. The result would be that in a salvage suit, unless there had been an agreement as to the value, no judgment, pronounced before the actual sale of the property, could ever be considered as final. In the present case, if I were to disregard the judgment founded on the appraisement, what judgment could I pronounce without a rehearing of the case? And a rehearing of the case would involve so much cost and inconvenience that it is practically out of the question. It has been suggested that the salvage award might be reduced in proportion to the difference between the appraised value and the value realized on the sale. But as the amount of salvage reward does not bear any fixed proportion to the value of the property salved, such a method of proceeding could not lead to any satisfactory result.

It is said that in a suit, by other salvors against the same ship and cargo, heard by the President, after the judgment of Gorell Barnes, J., he made a salvage award based upon values less than the appraised value. No doubt the President acted upon the evidence of the value of the property then brought before him. But the circumstance, that the evidence before the President in the one case was not the same as the evidence before Gorell Barnes, J., in the other, seems to me to afford no reason why the award of Gorell Barnes, J., should be varied.

I cannot see any sufficient ground for varying the decree. The defendants ask, not only that the judgment should be varied, but they ask for an order that the plaintiffs should pay the costs of the first appraisement of the ship and cargo. But as I have already said, I can find no fault with the appraisement. The circumstance that the property sold for a comparatively small sum is not, I think, proof that the defendants were correct in

(1) Law Rep. 1 A. & E. 50.

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stating the values of the ship and cargo to be less than the values at which they were appraised by the marshal.

I must, therefore, reject the motion with costs. (1)

Solicitors for owners of *The Georg*, and of her cargo: *Stokes, Saunders, & Stokes.*

Solicitors for salvors, the owners of the tugs *Challenge* and *Granville*: *Clarkson, Greenwell & Co.*

T. L. M.

C. A.

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July 26, 27.

[IN THE COURT OF APPEAL.]

THE MINNIE.

Admiralty—Collision—Narrow Channel—Starboard Side Rule—Regulations for Preventing Collisions at Sea, 1884, *art.* 21.

The plaintiffs' steamship, bound inwards, and the defendants' steamship, bound outwards, came into collision at night in the estuary of the Thames, a little above he Swin Middle Lightship, and a little to the westward of the direct course from that lightship to the East Maplin Buoy:—

Held, by the Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), that the defendants' vessel was to blame, inter alia, for being on the wrong side of the channel, as, in navigating the passage known as the Swin, between the Middle Lightship and the Middle Sands, every steamship must, when it is safe and practicable, keep to that side of the fairway which is on her starboard hand, the passage being a narrow channel within the meaning of article 21 of the Regulations of 1884 for Preventing Collisions at Sea.

APPEAL by defendants, the owners of the steamship *Minnie*, against a decision of Bruce, J., finding their vessel alone to blame for a collision with the plaintiffs' vessel *Freda*.

(1) On July 9, *Aspinall, Q.C.*, and *Stubbs*, moved the Court of Appeal, on behalf of the defendants, the owners of the *Georg*, and of her cargo, for leave to appeal against the award of 1500*l.* made by Gorell Barnes, J., on February 3, notwithstanding that the time for so doing had expired, on the ground that the salvage awards were in excess of the net proceeds, and that the value was not tested by sale until May. They also asked for leave to give further evidence as to the sum realized by the sale; but the Court (Lord Esher, M.R., Kay, and A. L. Smith, L.JJ.) refused the application (with costs in favour of the two tugs, plaintiffs, for whom *Joseph Walton, Q.C.*, appeared), as it was admitted that the award made by Gorell Barnes, J., was not improper on the materials before that learned judge, and the Court of Appeal intimated that subsequent events as to the sale of the property gave no ground for reviewing a decision based upon a valuation ascertained by appraisement, before the hearing, and not objected to at the time.

The case is reported only on the question as to the proper navigation for steamships—in view of article 21 of the Regulations for Preventing Collisions at Sea (1)—in the channel known as the Swin in the estuary of the Thames.

On May 10, 1894, about 11.30 P.M. a collision occurred a little above the Swin Middle Lightship, and a little to the westward of the direct course from that lightship to the East Maplin Buoy, between the German screw steamship *Freda*—of 625 tons net and 1001 gross register, from Dantzic to London, with a general cargo and eighteen hands—and the screw steamship *Minnie*, of 324 tons net and 520 gross register, from London to Goole with a general cargo, and a crew of thirteen hands. The weather at the time was fine and clear, the wind moderate from the S.W. and the tide first quarter flood, of the force of about 1 knot.

According to the evidence the *Freda* was in the East Swin below the Middle Lightship, on a S.W. b. W. $\frac{3}{4}$ W. magnetic course, making between 8 and 9 knots, when those in charge of her observed about 2 points on the port bow, and 2 to 3 miles distant, the masthead, and, shortly after, the green light of a steamer which proved to be the *Minnie*. The *Freda* was kept on her course until she approached the Middle Lightship, when her helm was starboarded to S.W. $\frac{3}{4}$ W. so as to pass to the southward of the lightship and follow the channel.

In the meantime the *Minnie*, which was approaching on a crossing course, drew ahead and then on to the starboard bow of the *Freda*, in a position to pass starboard to starboard. The whistle of the *Freda* was then sounded two short blasts to indicate that she was starboarding on to the course for the West Swin (which to the Maplin Buoy from the Middle Lightship would be about S.W. b. S.), when the *Minnie* ported, opening her red, and shutting in her green light. The *Freda* had gone off about half a point more to the southward on this second starboarding; but the helm was steadied, the engines stopped

(1) Regulations of 1884 for Preventing Collisions at Sea:—

Article 21: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

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and reversed full speed, and her whistle sounded three short blasts. The stem of the *Freda*, however, struck the *Minnie* on the port side abaft the bridge, both vessels sustaining great damage, and the *Minnie* shortly afterwards sinking.

The case set up by the *Minnie* was that when that vessel was between the Maplin and Swin Middle Lights, steering about N.E. b. N., and making about 8 knots, those in charge of her observed, 3 to 4 miles distant, and about a point on the starboard bow, the masthead and red lights of a steamer which proved to be the *Freda*. The red light drew on to their port bow so that the two vessels would pass port to port; but the *Freda* suddenly starboarding across the course of the *Minnie* caused the collision.

At the trial before Bruce, J., assisted by two of the Elder Brethren of the Trinity House, on June 13, 14, 15, and 16, reliance was placed by the plaintiffs on the decision of Gorell Barnes, J., in the *Corennie* (1), involving the question of the proper mode of navigating this channel; and Bruce, J., held, on the facts, that the *Minnie* was to blame, as she was to the westward of the line of the course from the Middle Lightship to the East Maplin Buoy, heading to the northward and westward

(1) In the case of *The Corennie* (1894, March 20, S. No. 404, Fol. 51) the plaintiffs' steamship the *Caroline*, bound inwards, sank almost immediately after collision (about 6.20 A.M. on February 1, 1893) with the defendants' steamship *Corennie* bound outwards, and the wreck fixed the place of collision as about 400 yards W. ¼ N. from the Swin Middle Lightship. Gorell Barnes, J., admitted evidence as to the navigation of the locality, and, referring to the charge made against the *Caroline* that she ought to have gone to the northward of the Middle Lightship, and had infringed article 21 of the Regulations, by being on the wrong side of the channel, the learned judge said: "After hearing the evidence .... I am satisfied .... that the usual recognised channel coming up in that locality is between the Swin Middle Lightship and the Swin Buoy, and that, though it is apparent that it is possible to pass to the northward, that is not the practice, nor is that part treated as a channel, at any rate at night. I have asked the Elder Brethren whether that evidence agrees with what they understand themselves to be the recognised way of passing, and I gather from them that it is correct, and that vessels do usually pass as described to the south and east of the Swin Middle Light. Therefore .... the *Caroline* did, in fact, keep to the starboard hand of the narrow channel up which she was proceeding."

of her course, and shewing her green light to the *Freda*, so that the *Freda* was, in the circumstances, justified in following the channel under her starboard helm, and shaping her course to pass the *Minnie* starboard to starboard.

On appeal,

Sir R. E. Webster, Q.C., *Aspinall, Q.C.*, and *Arthur Pritchard*, for the appellants, the owners of the *Minnie*.

Sir Walter Phillimore, and *Butler Aspinall*, for the respondents, the owners of the *Freda*.

LORD ESHER, M.R. The question here must be, What is the proper navigation for two steamships, one coming in from the sea, and the other going out to sea, when they are passing each other between the Middle Lightship and the North-East Maplin? It is an admitted part of that navigation that they are both to pass to the eastward of the Middle Lightship; but the space between the Middle Lightship and the Middle Sands is a very narrow passage. It is a narrow passage, not within the River Thames, so as to make any legislation with regard to the river apply, but it is on the sea, approaching a port through a narrow channel; and in my opinion, in those circumstances, the 21st rule applies. The 21st rule is this:— [The learned judge read the rule, and continued:—]

If they do so pass, that is, if they keep to that side of the fairway or mid-channel of the narrow channel which lies on the starboard side of the ship, then, of course, they are to pass each other port side to port side. That follows necessarily. Therefore ships which are to pass through this channel, which is between the Middle Lightship and the Middle Sands, ought each of them to pass through on the starboard side of the fairway which, I suppose, is the centre of the narrow channel, and so pass red light to red light, or port side to port side. The space is all clear, and the ships can see each other, as one is coming in and the other is going out, in plenty of time for both of them to judge whether they are likely to meet so as to pass each other somewhere between the Middle Lightship and the North-East Maplin Buoy. They cannot see the sands, which narrow the

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channel, but there is no promontory of land which prevents them from seeing each other.

The question is, how ought they to navigate? Taking first the outward vessel. Before she gets up to the Middle Lightship she is in a narrow channel. The narrow channel does not begin at the Lightship, which is at the narrowest part. We are advised by our nautical assessors that the outward vessel should steer to pass the East Maplin Buoy. I think by that is meant the old Maplin Buoy, which had a light to it at that time; that is the Maplin Spit Buoy—giving it half a cable's length; then should steer for the Middle Lightship, keeping it slightly on the port bow; but that does not mean that she is to steer for the Middle Lightship till she gets to it, because then, instead of being on the starboard side of that channel between the Middle Lightship and the Middle Sands, she would be as far as she possibly could be on the port side. Therefore before she gets there she must turn.

In the daytime it would be perfectly easy for her to turn, because she would see the Bell Buoy; but at night, even if she does not hear the Bell Buoy, if she sees the light of the Middle Lightship, she would know that before she approaches that she must port her helm so as to get on to the starboard side of the channel. She must port her helm gradually to go round, so as to keep on the east side of that middle channel. Therefore she has to steer for the Middle Lightship until, in the daytime, it is perfectly easy for her to see the Bell Buoy, and then she ought to go round it as close as she can; or, at night, when she has gone so near to the Middle Light vessel that a mariner who knows the chart must be aware that he is then safe with regard to the Bell Buoy, he ought to port his helm so as to keep on the starboard side of that narrow channel. That was the duty of the *Minnie*.

The inward vessel should pass the lightship close, and then steer the channel course, keeping the Maplin Spit Light a little on the starboard bow, so as to be safe from that, and though for her own safety she may keep the Maplin Spit a little on her starboard bow, so as to enable her to pass the North-East Maplin Buoy, she will be doing nothing wrong with regard to the other

ship if she goes more to the westward than that line. She puts herself into a difficulty, but not the other vessel, by doing that. Therefore she ought to go close to the Middle Light, which is for the purpose of giving all possible room for the other vessel to pass her port side to port side. When she has passed the Middle Light she ought not to go to the eastward, but may go somewhat to the westward of the light of which I have spoken.

That being the proper navigation, was the *Minnie* to the westward of the line? That is a matter of evidence and of fact, and is not a question for the nautical assessors. It is for us. Upon that we have the evidence of the man on the lightship, and if his evidence be correct, it is impossible for us to say that the learned judge in the Court below, with the assistance of the Trinity Masters, came to a wrong conclusion when he found that the collision took place to the westward of that line. Arguments have been used to shew that the vessels, after the collision, might have drifted one way or the other, but nobody can say for certain how they would drift, and Bruce, J., and the Trinity Masters, having come to the conclusion that the collision took place to the westward of that line, I can see nothing which enables us or justifies us in saying that it was wrong.

I have asked the nautical assessors whether, if the collision took place to the westward of the line of the Maplin Spit Buoy gas light, was the *Minnie* on the wrong side of the channel with regard to the *Freda*; and we are advised that if it took place to the westward of that line, the nautical result is that the *Minnie* was on the wrong side of the channel at the time the collision took place. If she was on the wrong side, it is impossible to say that that did not conduce to the collision. Therefore that puts the *Minnie* in the wrong.

If she got on the wrong side of the line, it must have been by inadvertently starboarding her helm, or keeping it to starboard longer than she ought to have done. If she did, and turned too short into the bight, it seems to me clear that she would probably shew her green light to the *Freda*, and the learned judge has found on the evidence that she did. I think she did, and if she did, and shewed that green light on the starboard bow of

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THE MINNIE.

Lord Esher, M.R.

the *Freda*, I cannot even bring myself to ask the question of the assessors, because I cannot doubt that the *Freda* was not wrong in starboarding her helm and deciding to pass as she did. She blew two whistles to give notice of what she was doing, and I think she could not be wrong in starboarding her helm then, so as to go green light to green light. She gave notice that that was what, under the circumstances, and in consequence of the place where the *Minnie* was, she was going to do. [The learned judge then dealt with the rest of the evidence, tending to shew that the *Minnie* was too far to the westward, and that her subsequent manœuvres, prior to the collision, were also wrong, and concluded:—] Under these circumstances I do not think we can overrule the judgment of the Court below.

KAY, and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants, the owners of the *Minnie*: *Pritchard & Sons.*

Solicitors for respondents, the owners of the *Freda*: *Thomas Cooper & Co.*

T. L. M.

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June 19; *July* 6.

WILLIAMS TORREY & CO. *v.* KNIGHT. THE LORD OF THE ISLES.

Admiralty—Insurance, Marine—Principal and Agent—Breach of Contract—Indemnity—Duty of Agent effecting Policy.

The plaintiffs, barge owners, hired the defendant's tug on the terms of indemnifying the defendant against all loss, damage, expenses or costs to which the defendant might be put by reason of collision or otherwise in connection with the tug, and the defendant undertook to keep the tug fully insured against all risks, including collision risk and damage to or by craft in tow of the tug or such craft colliding with others, and to indemnify the plaintiffs in respect of such damage to the extent of the moneys received by him under the insurance.

The defendant effected policies of insurance to cover the specified risks to the extent of 2000*l.* on an admitted valuation of the tug of 2800*l.*

A barge of the plaintiffs, whilst (it was alleged) in tow of the defendant's tug, came into collision with, and damaged, a steamer. The owners of the steamer sued the plaintiffs, who admitted liability, and, on the reference, the damages were assessed at 335*l.* 10*s.*, which sum was increased to 458*l.* 19*s.* 7*d.* by interest, the costs of the reference, and the costs incurred by the plaintiffs in the proceedings against them.

The defendant sent in the plaintiffs' claim to the underwriters, and, on their

refusal to pay, offered to hand over the policies to the plaintiffs; but the plaintiffs required the defendant to sue the underwriters, and, in default, to pay the plaintiffs the above amount by way of damages for breach of contract. The defendant denied liability beyond the proportion of the claim for the damage on the uninsured value of the tug, and in respect of this liability paid 165*l.* 1*s.* into court:—

Held, by Bruce, J., that the defendant was entitled to judgment, as he had not broken his contract, and was not bound, without an indemnity, to take legal proceedings, at his own cost and risk, against the underwriters.

ACTION under a contract of indemnity, or, in the alternative, for damages for breach of contract. The plaintiffs were Williams Torrey & Field, Limited, owners of barges and other craft for transport purposes; the defendant was James Percy Knight, tug owner, carrying on business as the Kaiser Steamtug Company.

The substantial question raised was, whether the defendant, the owner and insurer of the tug *Kaiser*, was bound to sue the underwriters on their refusal to pay a loss sustained by the plaintiffs, as charterers of the tug, by reason of a collision by craft, alleged to be in tow of the tug, and a third vessel.

By an agreement in writing, dated June 10, 1892, the defendant let and the plaintiffs hired the defendant's screw steam tug *Kaiser*, of the admitted value of 2800*l.*, at a weekly rent, for four weeks from June 8, 1892, and thence from week to week until determined by notice. The plaintiffs agreed to keep and maintain the tug in good repair (fair wear and tear and any flaw or defect in the machinery excepted) and in such good repair at the termination of the agreement deliver up to the defendant, and it was further provided that the plaintiffs should, during the continuance of the agreement, indemnify the defendant against penalties or forfeitures arising out of any breach of any of the provisions of any Act of Parliament or by-law affecting the tug, and also against any loss, damage, expenses or costs the defendant might be put to by reason of collision salvage services or otherwise in connection with the tug, and the *defendant agreed to fully insure and keep the tug insured* against all risks, including collision risk and risk of damage to or by craft or vessels in tow of the tug, or such vessels or craft colliding with others, and the defendant undertook to furnish to the plaintiffs an abstract of the policy or policies effected, provided

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always that if at any time during the continuance of the agreement the tug should be damaged by or should occasion damage to craft or vessels in tow of the tug and the tug or any craft or vessel that she might be towing should be damaged by or should occasion damage to any craft or vessels or otherwise which should be covered by the insurance, then the *defendant would indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance.*

The defendant effected policies on behalf of himself, and all others interested, to cover the specified risks for 500*l.*, 450*l.*, and 1050*l.*, in all 2000*l.*, leaving 800*l.*, the balance of the agreed value of the tug, uninsured.

On June 26, whilst the defendant's tug was swinging round the barges of the plaintiffs, which she had in tow, above London Bridge, the tow-rope of one of the barges broke, and the barge came into collision with, and damaged, the steamship *Lord of the Isles*, lying at her moorings off the Old Swan Pier. The owners of the steamship commenced an action in personam against the present plaintiffs, and they, as defendants in that action, having admitted their liability, the damages were assessed by the registrar at 335*l.* 10*s.* This sum, with 1*l.* 5*s.* 9*d.* interest and 68*l.* 12*s.*, the amount of the taxed costs payable to the owners of the *Lord of the Isles*, together with 53*l.* 11*s.* 10*d.*, the plaintiffs' own costs in the action brought against them, made up a total of 458*l.* 19*s.* 7*d.*

The defendant, on receipt of this claim of the plaintiffs, sent it on to the underwriters, who refused to pay. Thereupon the defendant offered to hand over the policies to the plaintiffs, and give every assistance; but the plaintiffs insisted that the defendant was bound to collect the money from the underwriters, and, in default of payment, to sue them, or to pay the amount either under his alleged contract of indemnity, or by way of damages for breach of contract.

The defendant paid 165*l.* 1*s.* into Court, being the proportionate part of the claim for damage to the *Lord of the Isles* on the uninsured value of the tug, and denied further liability.

The action was tried on an agreed statement of facts, to which

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was appended the agreement as to the hire of the tug, the policies of insurance effected by the defendant, and the proceedings in the action by the owners of the *Lord of the Isles*.

Pyke, *Q.C.*, and *Hurst*, for the plaintiffs. As to the claim itself, apart from the question of the costs: If the defendant is to be assumed to have fulfilled the first part of the agreement, then, as the defendant undertook to indemnify the plaintiffs in respect of damage to the extent of moneys received under the insurance, the duty was cast upon him of collecting the money, and, on the underwriters making default in payment, he was bound to sue them on the policies effected by him in his own name, and to which the plaintiffs are not parties. If the defendant cannot recover all the money from the underwriters because he did not fully insure, then he has broken his contract, and is liable to make good the amount by way of damages for breach of contract. Secondly, as to the costs: These are recoverable from the defendant on the principle that they were not incurred in unreasonably defending the action brought by the owners of the *Lord of the Isles*, for the plaintiffs, to avoid expense, admitted their liability, and only incurred the costs in ascertaining the extent of that liability: see per Pollock, C.B., in *Smith* v. *Howell*. (1) The plaintiffs gave the defendant notice of the steps being taken, and the defendant did not prohibit the plaintiffs from putting the owners of the *Lord of the Isles* to proof of their claim. In such a case the costs are recoverable: *Blyth* v. *Smith*. (2)

Aspinall, *Q.C.*, and *Butler Aspinall*, for the defendant. There is a difficulty in getting underwriters to insure a tug to the full amount against the specified risks; but as the defendant has admitted, by paying the amount into Court, that he is responsible to the extent the tug was uninsured, no question arises on that point. In respect of the residue of the claim, it is submitted that no liability attaches to the defendant, as he has fulfilled his obligations under the agreement by insuring and sending the plaintiffs' claim on to the underwriters. There is no contract by the defendant to indemnify, except to the extent of

(1) 6 Ex. 730, at p. 736. (2) 5 M. & Gr. 405.

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moneys received, and the agreement cannot be construed into an obligation on the part of the defendant to bring an action, at his own cost and risk, against underwriters, who allege, rightly or wrongly, that, as a matter of fact, the barge was not in tow of the tug at the time of the collision. The agreement constituted a demise of the tug, which thereby passed out of the control of the defendant, and, through the negligence of the plaintiffs' servants, the claim arose. For this negligence of their servants the plaintiffs admitted their liability in an action in personam, and went to a reference on that footing. The plaintiffs were pro hâc vice owners of the tug: see the judgment of Sir James Hannen in *The Tasmania* (1), referring to *The Lemington*. (2) At any rate, whether an action in rem would lie or not, the defendant was not liable at common law for the damage done by those in charge of the tug, who were not his servants, and the plaintiffs had an insurable interest entitling them to sue: Arnould on Marine Insurance, 6th ed. p. 61, citing the American case of *Oliver* v. *Greene*. (3) It may be that the defendant has also an insurable interest; but the policies were taken out by the defendant for the purpose of protecting the plaintiffs against loss arising under their own contract to indemnify the defendant; and, though the interests of the charterers and of the owners may be united in one policy, the underwriters, in any event, are only liable for the aggregate interest actually at risk. If the insurable interest of both parties is covered, the person whose interest is damaged by the act complained of is the person to sue, for the only question in these cases is, on whose behalf the policy is made: *Sutherland* v. *Pratt*. (4)

As to the costs, the plaintiffs, at the reference, contested the claim for which they were personally liable, and did not act as reasonable and prudent men, unindemnified, would have acted. The plaintiffs cannot, therefore, make the defendant responsible: see the cases collected in Chitty on Contracts, 12th ed. p. 590.

Pyke, Q.C., in reply.

Cur. adv. vult.

(1) 13 P. D. 110, at p. 117.
(2) 2 Asp. M. L. C. 475.
(3) 3 Mass. Rep. 133.
(4) 11 M. & W. 296; 12 M. & W. 16.

July 6. BRUCE, J. [After stating the nature of the action, and the material facts already set out, the learned judge proceeded:—]

The complaint made in this action is that the defendant has not endeavoured to collect, and has not received, any moneys under the insurances effected by him, and the plaintiffs contend that they are entitled to recover from the defendant the amount of 458*l.* 19*s.* 7*d.* The defendant having failed to insure in respect of the balance of 800*l.* part of the sum of 2800*l.*, the agreed value of the tug, admits that he is liable to pay to the plaintiffs a sum of money bearing the same proportion to their claim that 800*l.* bears to the 2800*l.*, and he has brought into court 165*l.* 1*s.* He contends that as to the residue of the claim he is not liable, because, having insured to the extent of 2000*l.* in respect of the risks mentioned in the agreement, he has fulfilled his obligation as regards the insurance, and as his agreement to indemnify is limited to the extent of the moneys received by him under such insurance, and as he has received nothing under the insurance, he is under no obligation to indemnify.

The question in dispute resolves itself practically into this: Upon whom does the burthen rest of compelling the underwriters to pay the amount of the loss insured by the defendant? The defendant agreed to insure, and I think it must be taken that the insurance was entered into to cover the plaintiffs' interest. It may be that the policy covered the defendant's interest also, and that, in the case of a total loss of the tug by perils of the sea, the defendant would, in certain events, be entitled to recover under the policy. But in the event which has happened, which has resulted in a loss to the plaintiffs, I do not doubt that the policy must be regarded as having been effected for the plaintiffs, and that any money recovered under the policy, in respect of the loss now in question, would enure for the benefit of the plaintiffs. It is contended that as the policy was effected by the defendant for the plaintiffs' benefit, he was their agent to effect the policy on their behalf, and it was, therefore, his duty to enforce the policy and to take proceedings against the underwriters to recover the money due under the policy. It appears from the defendant's letter of April 26, 1893, that he did apply to the underwriters to pay the

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Bruce, J.

claim, and that they referred him to their solicitors, and by letter dated January 3, 1894, the defendant offered to hand over the policies to the plaintiffs; but the plaintiffs insist that the defendant must do more, and that he must, without any offer of an indemnity from them, at his own cost and risk, take legal proceedings against the underwriters.

I can find no authority in favour of this contention. No doubt where an agent effects a policy on behalf of a principal, and retains the policy with the consent of the principal, it becomes his duty to use reasonable diligence to enforce the rights and protect the interests of his principal in all matters arising out of the contract. By his negligence in the discharge of these duties the agent may render himself personally liable: *Bousfield* v. *Creswell.* (1) But where he does all that is necessary to preserve the rights of his principal and demands the amount claimed on the policy from the underwriters, I think he does all that he can reasonably be expected to do. He is not bound to indemnify his principal against the trouble or expense of proving the justice of his claim. It is the principal who can alone, in most cases, furnish the proofs and documents by which the claim can be sustained. In the present case I understand that the underwriters deny that the barge that did the damage was at the time in tow of the tug. That is a fact which the underwriters are entitled to have proved. It is not reasonable that an agent should be exposed to the hazard and expense of a litigation to which he is a stranger. These are the rules which are laid down in Duer on Insurance, and, in the absence of judicial decision, I do not know of any higher authority. Even in the case of a del credere agent that learned author observes (2): "Where the liability of the principal debtor, as in the case of the underwriter, is not absolute, but contingent; where it depends upon facts, the evidence of which it is the province and the duty of the assured to furnish, until that evidence has been given and has proved conclusive, it seems to be clear that the del credere agent ought not to be held

(1) 2 Camp. 545.

(2) Law and Practice of Marine Insurance, by John Duer, 1846, lect. xii., "Of the extent of the Liability of the Agent," § 41.

responsible; for, until then there is no certainty that a debt exists to which his guarantee was meant to apply."

In the present case the defendant did not guarantee the solvency of the underwriters, and it seems to me to be unreasonable to fix upon him a higher obligation than would attach to him if he had given such a guarantee.

These principles are, I think, in accordance with the general law. If an agent has, at the express or implied request of his principal, necessarily incurred expenses in carrying on litigation on behalf of his principal, these expenses must be borne by the principal, and the agent will be entitled to recover them from the principal: see *Howes* v. *Martin* (1); *Curtis* v. *Barclay* (2); and I think it follows that the agent may, in cases where communication with the principal is possible, demand an indemnity before commencing litigation: *Lacey* v. *Hill* (3); see also, as to the liability of a trustee where there is a covenant to insure against fire, *Tudball* v. *Medlicott.* (4)

For the reasons I have given, I have come to the conclusion that the defendant has not been guilty of any breach of his contract. It does not appear that he has not been ready and willing to do everything that he was bound to do to enable the plaintiffs to obtain the benefit of the policies effected on their behalf.

I have not thought it necessary to consider the question whether the action on the policy should be brought in the name of the plaintiffs or in that of the defendant, because it has not been shewn that the defendant has been unwilling to allow the plaintiffs to use his name on a proper indemnity being given: see *Ex parte Kearsley* (5).

In the result I must give judgment for the defendant. The plaintiffs are, I think, entitled to costs up to the date of the payment into court, and the defendant is entitled to the costs since that date.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendant: *Jennings & Son.*

(1) 1 Esp. 162.
(2) 5 B. & C. 141.
(3) Law Rep. 18 Eq. 182.
(4) 36 W. R. 886.
(5) 17 Q. B. D. 1.

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Aug. 22.

[IN THE CONSISTORY COURT OF LONDON.]

THE VICAR AND CHURCHWARDENS OF ST. PETER'S, EATON SQUARE *v.* THE PARISHIONERS OF THE SAME AND OTHERS INTERESTED.

Ecclesiastical Law—Faculty—Second Communion Table—Separation of Side Chapel from Aisle of Church—Chancel Screen with Gates.

The Consistory Court of London, before granting a faculty authorizing the placing of a second Communion Table in a side chapel under the same roof as a parish church, requires to be satisfied that the side chapel in which it is proposed to place the second Communion Table is separated from the aisle of the church by trellis-work or otherwise, so as to indicate that it is, in Ecclesiastical Law, a side chapel, intended for use as such when the chancel or nave of the church is not used for divine service.

THIS was a cause of faculty instituted on behalf of the vicar and churchwardens of St. Peter's, Eaton Square, in the Diocese of London, against the parishioners of the same, and others interested, for the purpose of obtaining a faculty to authorize certain additions and alterations, specified in the judgment, in the parish church aforesaid.

Aug. 8. The cause was now heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

The vicar of the parish, one of the churchwardens of the parish, and one of the architects consulted with respect to the proposed alterations, were examined in support of the faculty prayed for.

The result of their evidence, so far as material, is stated in the judgment.

Cur. adv. vult.

Aug. 22. DR. TRISTRAM. In this case an application was made to the Court on the 8th of the present month to grant a faculty to authorize the making of certain alterations in the parish church of St. Peter's, Eaton Square, the principal ones being the construction of a side chapel, and the placing of a second Holy Table therein, and the erection of a chancel screen with gates.

The cost of the construction of the side chapel will be defrayed by a lady, and that of the erection of the chancel screen by a parishioner, as a memorial to a relative.

The plans of the proposed alterations were designed by Sir Arthur Blomfield, and were approved of by the unanimous vote of a parish vestry (composed of fourteen parishioners) summoned for the purpose of the consideration of such plans and held on June 24 last, and Mr. Ram, one of the churchwardens, stated in his evidence that a large number of other members of the vestry had seen and approved of the design. No objection is taken to the construction of the side chapel or to the placing of a Holy Table therein. It appears by the evidence that this alteration is for the convenience of the parishioners, with a view to the chapel being used for daily prayer, and for the administration of early Holy Communion, when a small congregation only is present.

Objection has, however, been taken to the introduction of the screen on the ground of its height in a memorial presented to the Court by Mr. Ram, who is the people's churchwarden, and signed by twenty-four parishioners, including some of the principal residents in the parish. Personally Mr. Ram supports the erection of the screen; but he very properly, as the representative of the parishioners generally, undertook to bring to the notice of the Court the objections entertained to it by the memorialists. The objections of the memorialists to the screen are two-fold: First, that it is unsuitable, and will destroy the present beauty of the chancel; and secondly, that the pulpit, which is to be attached to it, will not only disfigure the screen, but will also obstruct the view of the chancel from a part of the church.

Since the hearing of the case, I have inspected the church with a view to enable me better to appreciate these grounds of objection, as well as the grounds which were pressed on the Court by the vicar in support of Sir Arthur Blomfield's plan.

The question raised by the memorialists is solely one of architectural beauty and taste; and unless the Court is satisfied that a manifest benefit will be obtained by the proposed change, it might well hesitate to force it on the memorialists. But from the evidence it is clear that the erection of a screen with gates

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Dr. Tristram.

will serve the useful purpose of protecting the property in the chancel, when the church is open for private prayer; and, after inspecting the church, having come to the conclusion that the screen, being an extremely light one, would not materially obstruct the view of the chancel or darken it, I will order a faculty to issue for its erection.

On inspecting the church, I observed that there was no separation according to the plan filed between the side chapel in which it is proposed to place the second Holy Table and the south aisle of the church, and as there is a Holy Table to be placed in the side chapel, the Court is of opinion that the chapel in question should be separated from the aisle by light trellis-work with gates, or otherwise, so as to indicate that it is, in Ecclesiastical Law, a side chapel intended for use as such when the chancel or nave of the church is not used for service. The faculty will therefore issue, authorizing the alterations mentioned in the petition, including the erection of the chancel screen with gates in accordance with the design of Sir Arthur Blomfield, and the construction of the side chapel, but subject to a proviso that the chapel be separated from the south aisle by light trellis-work with gates. (1)

(1) See *In the Matter of Holy Trinity Church, Stroud Green* (12 P. D. 199), and *Re St. Paul's, Wilton Place* (Tristram, p. 120).

C. F. J.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1895, will be as follows:—

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CHURCH—*continued.*

of his death his remains might be cremated, and a certificate was brought in to the effect that the vestry of the parish was in favour of the remains being interred beneath the church:—*Held*, that the burial of the cremated ashes of a dead body in the church had not been prohibited by the Church Building Act, 1818, the Public Health Acts, 1848 and 1875, or by the Order in Council closing the church under the Burial Act, 1853; the provisions in those Acts as to "burial" not applying to the burial of the remains of a corpse after it had been reduced to ashes, and that the Court had jurisdiction in its discretion to grant the faculty as prayed, but must decline to do so having regard to the inconvenience which might ensue in case of alterations in the church, &c., if the urn was deposited in the church wall according to the proposal of the applicant:—*Held*, also, that the Court, having ascertained from the Home Office that no objection on sanitary grounds was entertained by the Home Secretary to the interment of the urn containing the remains below the floor of the church, was prepared, at the request of the applicant, to decree the issue of a faculty for the urn and its contents being so interred below the church, subject to a proper fee for the interment being paid to the incumbent of the parish: —*Semble*, that cremated remains cannot lawfully be interred in or under a parish church except under the authority of a faculty from the Ordinary. IN RE KERR - - - 284

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CHURCH—*continued.*

nave of the church would be wholly cut off, and at the hearing of the suit it appeared that if the faculty were granted and the screen erected as proposed, the gates to it would be kept open during the performance of divine service, but would be fastened at other times when the church was opened, and, being so fastened, would afford protection against the contents of the chancel and vestries being injured or stolen.—The Chancellor of the diocese of St. Albans being of opinion that the grant of a faculty, authorizing the erection of the gates, would be an exercise of his discretion in opposition to the decision of the Court of Arches in *Bradford* v. *Fry* (4 P. D. 93), refused the faculty as prayed, but intimated that if the petitioners desired, the Court would decree a faculty to issue for the erection of the chancel screen without any gates to it. RECTOR, &c., OF ST. ANDREW, ROMFORD *v.* ALL PERSONS HAVING INTEREST, &c. - 220

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5. —— *Inscription—Memorial Inscription in Parish Church—Prayers for the Dead—Twenty-Second Article of Religion—Discretion of Ordinary.*] An application was made to the Consistory Court of Chester to authorize by faculty the erection in a parish church in the diocese of Chester of a stained glass memorial window, having placed

CHURCH—*continued.*

below it an inscription in Latin, the translation of a portion of which was as follows: "Of your charity pray for the soul of H. F. . . . deceased . . . . and for the soul of J. H. C. . . . deceased": —*Held*, that the Ordinary ought not in his discretion to sanction the introduction into the church of any inscription of which the above words would form part, and that so much of the application as prayed that a faculty might be granted for placing such words beneath the proposed window must be rejected.—*Breeks* v. *Woolfrey* (1 Curt. 880) discussed. EGERTON *v.* ALL OF ODD RODE - - - - 15

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—— Chancel screen—Discretion to grant faculty
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—— Memorial inscription in parish church—Prayers for the dead - - 15
See CHURCH. 5.

—— Second communion table—Separation of side chapel from aisle of church—Chancel screen with gates - - 350
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INSCRIPTION—Memorial inscription in parish church—Prayers for the dead—Twenty-second Article of Religion—Discretion of ordinary - - - - 15
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11 & 12 Vict. c. 63, s. 83 - - - 284
See CHURCH.
16 & 17 Vict. c. 134, s. 3 - - - 284
See CHURCH.
38 & 39 Vict. c. 55, s. 343 and Sched. V. Part III. - - - - 284
See CHURCH.

WORDS—"Burials" - - - 284
See CHURCH.

PROBATE.

ADMINISTRATION—*Person "not lawfully detained as a Lunatic and not found a Lunatic by inquisition, but through mental infirmity arising from age incapable of managing his affairs"—Person appointed to act with the powers of a Committee—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*d*), *sub-s.* 2—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.] The sole next of kin of a deceased intestate was a person "not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental in-

ADMINISTRATION—*continued.*

firmity arising from age incapable of managing her affairs," within the meaning of sub-s. 1 (*d*) of s. 116 of the Lunacy Act, 1890. Her estate was administered by a person appointed to act with the powers of a committee under sub-s. 2 of such section.—The Court made a general grant of administration, under s. 73 of the Court of Probate Act, 1857, to the person thus appointed for the use and benefit of the next of kin. IN THE GOODS OF LEESE - - - - 160

ADMINISTRATION WITH WILL ANNEXED—*No Executor or Residuary Legatee—Testatrix deserted by her Husband—"Special Circumstances"—Grant to Son without citing Husband—Practice—The Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), s. 73.] Upon an application for administration with the will annexed, it appeared that the testatrix had been deserted by her husband fifteen years prior to her death, and had not heard of or from him after such desertion.—The Court passed over the husband without citation of any kind, and granted administration with the will annexed, under s. 73 of the Court of Probate Act, 1857, to a son of the testatrix, who by the will was nominated trustee and manager of a certain partnership interest which represented substantially the whole of the estate of the testatrix. IN THE GOODS OF SHOOSMITH - 23

ADMINISTRATOR—Duration of functions 262
See PRACTICE. 3.

—— Grant to representative of next of kin—Necessity for citation of person entitled in distribution - - - 264
See PRACTICE.

CASES—*Barry* v. *Butlin* (2 Moo. P. C. 480) considered - - - - 151
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—— *Fulton* v. *Andrew* (Law Rep. 7 H. L. 448) considered - - - - 151
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DOMICIL—Foreign will—Law of country of domicil—Form of grant - - 260
See PRACTICE. 2.

EVIDENCE—Probate—Will—Onus probandi—Will prepared under suspicious circumstances - - - - 151
See WILL. 3.

—— Will—Appointment of executor—Misdescription—Parol evidence—Declarations of testator - - - - 98
See WILL.

EXECUTOR—Appointment of—Misdescription—Parol evidence—Declarations of testator - - - - - 98
See WILL.

FOREIGN ASSETS—Probate—Will dealing with real and immoveable property abroad 39
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FOREIGN WILL—Persons appointed to realize property in England on behalf of foreign executors—Law of country of domicil—Form of grant - - - 260
See PRACTICE. 2.

GRANT OF PROBATE—Appointment of executor—Misdescription—Parol evidence—Declarations of testator - - 98
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—— Testamentary papers—Validity—Incorporation—Refusal of probate - 90
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GRANT OF PROBATE—*continued.*

—— Will—Obliteration—Words of will before alteration whether "apparent" - 191
See WILL. 2.

—— Will—Onus probandi—Will prepared under suspicious circumstances - - 151
See WILL. 3.

MARRIED WOMAN—Administration with will annexed—Testatrix deserted by her husband—"Special circumstances" 23
See ADMINISTRATION WITH WILL ANNEXED.

MISDESCRIPTION—Parol evidence—Appointment of executor - - - 98
See WILL.

PRACTICE—*Administration—Grant to Representative of Next of Kin—Necessity for Citation of person entitled in Distribution—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.] Under s. 73 of the Probate Act, 1857, a grant of administration may be made to the representative of the next of kin of an intestate without citing a person entitled in distribution. IN THE GOODS OF KINCHELLA [264

2. —— *Foreign Will—Persons appointed to realize Property in England on behalf of Foreign Executors—Law of Country of Domicil—Form of Grant.*] A person domiciled in Germany made a will appointing persons in England to realize his property in England, and pay over the proceeds to his executors in Germany. The Court made a grant to these persons of administration for the use and benefit of the executors in Germany, on the ground that such grant would enable them to perform in England the duties imposed on them, according to German law, by the instrument appointing them. IN THE GOODS OF BRIESEMANN [260

3. —— *Probate Action—Administrator Pendente Lite—Duration of Functions.*] The functions of an administrator pendente lite terminate with a decree pronouncing in favour of a will with executors.—*Semble*, that the case is the same if there be no executors. WIELAND *v.* BIRD [262

—— Administration with will annexed—Married woman—Grant to son without citing husband - - - - 23
See ADMINISTRATION WITH WILL ANNEXED.

STATUTES:

1 Vict. c. 26, ss. 20, 21 - - - 191
See WILL. 2.

20 & 21 Vict. c. 77, s. 73 - - - 23
See ADMINISTRATION WITH WILL ANNEXED.

—— —— —— - - - - 264
See PRACTICE.

20 & 21 Vict. c. 77, s. 73 - - - 160
See ADMINISTRATION.

53 & 54 Vict. c. 5, s. 116, sub-s. 1 (*d*), sub-s. 2
See ADMINISTRATION. [160

WILL—*Appointment of Executor—Misdescription—Parol Evidence — Declarations of Testator.*] Where a testator appointed, as one of his executors and trustees, "Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," and there was no Robert Taylor living at Warmley Hill in the parish of Bitton, but there was a James Alfred Taylor, bootmaker, living there, and it appeared that Robert Britton Taylor, his brother, also a bootmaker, lived at Hanham, in the same parish:—*Held*, that extrinsic evidence might be received to shew that "James Alfred Taylor, of Warmley Hill," was a friend of the testator, and, that the testator had little acquaintance with "Robert Britton Taylor, of Hanham"; and, the Court having considered such evidence, ordered probate to issue to James Alfred Taylor, of Warmley Hill:—*Semble*, that evidence of declarations by the testator which tended to shew that he intended James Alfred Taylor, and not Robert Britton Taylor, to be his executor, was inadmissible. IN THE GOODS OF JOHN CHAPPELL [93

2. —— *Obliteration — Words of Will before Alteration whether "Apparent" — Evidence of Experts in Writing of what nature admissible—Wills Act* (1 *Vict. c.* 26), *ss.* 20, 21,] By s. 21 of the Wills Act (1 Vict. c. 26), "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will."—Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the section, if experts using magnifying glasses, when necessary, can decipher them, and satisfy the Court that they have done so; but it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it.—Slips of paper which could have been removed, leaving the document intact, were, after the execution of a will, pasted over certain words in it. These words could be read by an expert in writing, on placing a piece of brown paper round them, and holding the document against a window pane:—*Held*, that such concealment amounted to an "obliteration" of the words, but that as they could be read by an expert in writing using the above means, they were "apparent" within the meaning of the section. FFINCH *v.* COMBE 191

3. —— *Onus probandi—Will prepared under Suspicious Circumstances.*] The rule throwing upon the party propounding a will prepared by a person who takes a benefit under it the burden of shewing that the paper propounded expresses the true will of the deceased, is not confined to cases where the will is prepared by a person taking a benefit under it, the true rule to be deduced from *Barry* v. *Butlin* (2 Moo. P. C. 480), *Fulton* v. *Andrew* (Law Rep. 7 H. L. 448), and *Brown* v. *Fisher* (63 L. T. 465) being, that wherever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such

WILL—*continued.*

suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument.—At the trial of an issue as to the validity of a will, it appeared that the testatrix, in 1880, and again in 1884, made a will in favour of the defendant. Afterwards she became dissatisfied with him, and from 1888 to 1892 wrote repeatedly to her solicitor making serious complaints against him. On November 7, 1892, she made a will leaving her property to the plaintiff. On November 9, T. P., a son of the defendant, brought to her a will prepared by himself, leaving her property to the defendant. This will was executed by her in the presence of and attested by T. P. and a young friend of his, no one else being present, and the existence of this will was not known to any one else till after the death of the testatrix on the 23rd. The only evidence adduced by the defendant, the party setting up the later will, was that of the attesting witnesses to such will, who were orally examined, and deposed clearly that the will was read over to the testatrix, and that she appeared to understand it and approved of it. The President pronounced in favour of the later will:—*Held*, on appeal, that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed, and that the former will must be established. TYRRELL *v.* PAINTON C. A. 151

4. —— *Testamentary Papers — Incorporation—Will dealing with Real and Immoveable Property in a Foreign Country.*] Where a testator, domiciled in England, left a will and two codicils dealing with real and personal property in this country, and personal property in Russia; and also left two other documents, one of which was a will, duly executed in accordance with English law, and both referring only to property in Russia, and appointing separate executors in respect of that property:—Upon the joint application of the executors and trustees of all the property in both countries:—The Court refused to allow the documents referring only to property in Russia to be included in the probate of the English wili and codicils. IN THE GOODS OF TAMPLIN - 39

5. —— *Testamentary Papers—Validity—Incorporation—Inadmissibility—Refusal of Probate.*] The testator executed a document in the presence of two witnesses, who duly attested it. The document appointed no executors and contained no bequest, but referred to "the enclosed papers, numbered 1, 2, 3, 4, 5, and 6," as containing his testamentary wishes, and recited that those papers had been signed by himself in the presence of the witnesses, who, however, stated positively that they had never seen any of them. They deposed that the deceased called them into his study, told them he had made certain alterations in his will, and asked them to witness his signature; at the same time pointing to a drawer in the table at which he was sitting, saying, "The will is in this drawer." Papers 1 to 6 bore various dates antecedent to the attested document. All the papers were holograph, and the attestation clause of the attested document referred to the deceased as the "testator." All the parties interested having consented to the case being dis-

WILL—*continued.*
posed of on motion:—*Held*, that as the documents 1 to 6 were not clearly identified with the description given of them in the attested paper, so as to exclude the possibility of mistake, they could not be taken to be incorporated with such paper; and, as the attested paper, without the others, would be inoperative, probate of all the documents must be refused. IN THE GOODS OF GARNETT - 90

—— Obliteration—Words of will before alteration whether "apparent" - - 191
See WILL. 2.

WORDS:

—— "Apparent" - - - - 191
See WILL. 2.

—— "Not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing his affairs" - - 160
See ADMINISTRATION

—— "Special circumstances" - - 23
See ADMINISTRATION WITH WILL ANNEXED.

DIVORCE.

ACCORD AND SATISFACTION—Divorce—Agreement to accept sum smaller than amount due under maintenance order - 204
See ALIMONY.

ALIMONY—*Accord and Satisfaction—Order for Permanent Maintenance—The Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32)—*Contract—Consideration—Agreement to accept Sum smaller than Amount due under Maintenance Order.*] A wife having obtained a decree nisi for the dissolution of her marriage, an order was made under the Matrimonial Causes Act, 1866, that from the date of the decree absolute the husband should pay her 40*l.* a year by monthly payments. The decree was made absolute, and she married again. Subsequently she and her second husband, by writing not under seal, agreed with the late husband, in consideration of 10*l.* paid to them by him, to give up all claims in respect of the payments directed by the order. At this time 16*l.* was due to the wife for arrears. Subsequently she issued a writ of fi. fa. to enforce payment of 80*l.* arrears of the allowance for maintenance. The President set aside the writ on the ground that it had been issued in contravention of the agreement:—*Held*, by the Court of Appeal, that the agreement being for the release of all claims in respect of the maintenance order in consideration of the payment of a sum less than the amount which was at the time due and payable under such order, was invalid for want of consideration, and did not prevent the wife from enforcing payment of the 80*l.* UNDERWOOD *v.* UNDERWOOD C. A. 204

2. —— *Alimony Pendente Lite — Jurisdiction—Suit for Nullity of Marriage—Application for Alimony after Decree Nisi.*] The Court has jurisdiction to grant alimony pendente lite in a suit by the husband for nullity of marriage upon the ground that the wife was within the prohibited degrees, and the application may be made by the wife after a decree nisi has been pronounced, if the decree has not been made absolute.—*Bird* v. *Bird* (1 Lee, 209) followed.—*Blackmore* v. *Mills* (16 W. R. 893) explained. FODEN *v.* FODEN - - - C. A. 307

3. —— *Permanent Maintenance—Income of Respondent—Profits of Partnership Business—Undrawn Profits—The Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*The Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1—

ALIMONY—*continued*
Order for Security.] In a petition for maintenance by a wife who had obtained a decree absolute for the dissolution of her marriage, it appeared that the husband's income was derived from a share in the profits of a firm of which he was one of the partners:—*Held*, that he must be ordered to secure permanent maintenance for the wife, upon the basis of one-third of the whole of his share of the average profits to which he had been entitled during the three preceding years, although by the terms of the partnership, he was only entitled to draw a limited amount of the profits, unless with the consent of his partner. HANBURY *v.* HANBURY - - - - - - 102

4. —— *Permanent Maintenance—Income of Respondent—Profits of Partnership Business—Undrawn Profits—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.] Upon an application after a decree for dissolution of marriage for an order under s. 32 of the Matrimonial Causes Act, 1857, that the husband should secure to the wife an annual sum of money, it appeared that he was partner in a brewery, and was entitled to receive 200*l.* per month in respect of his share of the profits, but could not draw anything more without the consent of his partner. His share of the profits had for several years past amounted to about 3300*l.* a year, but he had received only the monthly allowance amounting to 2400*l.* a year, the rest being carried to his credit in the partnership books:—*Held* (reversing the decision of the President), that, for the purpose of determining the amount of the annual payment to be secured to the wife, the husband must be treated as having only an income of 2400*l.* HANBURY *v.* HANBURY - - - - C. A. 315

CASES:—*Badham* v. *Badham and Gorst* (62 L. T. 663), followed - - - 33
See PRACTICE. 3.

—— *Bird* v. *Bird* (1 Lee, 209) followed - 307
See ALIMONY. 2.

—— *Blackmore* v. *Mills* (16 W. R. 893) explained - - - - 307
See ALIMONY. 2.

—— *Blandford* v. *Blandford* ([1892] P. 148) overruled - - - - 295
See CHILDREN, MAINTENANCE OF.

CASES—*continued.*

—— *Glennie* v. *Glennie*] (3 Sw. & Tr. 109) doubted - - - - 248
See PRACTICE. 5.

—— *Grieve* v. *Grieve* ([1893] P. 288) followed
See PRACTICE. 6. [31

—— *Lander* v. *Lander* ([1891] P. 161) distinguished - - - - 33
See PRACTICE. 3.

—— *Moore* v. *Moore* ([1892] P. 382) followed 161
See PRACTICE. 4.

CHILDREN, MAINTENANCE OF—*Child above the age of Sixteen—Jurisdiction—The Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*The Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.] The Court has power to make orders respecting the custody, maintenance, and education of children during the whole period of their infancy—that is, till they attain the age of twenty-one years.—*Blandford* v. *Blandford* ([1892] P. 148) overruled. THOMASSET *v.* THOMASSET - - - - - C. A. 295

CONDONATION—Wife's petition for divorce—Collusion and condonation after decree nisi - - - - 161
See PRACTICE. 4.

CONTRACT — Consideration — Divorce —Agreement to accept sum smaller than amount due under maintenance order - 204
See ALIMONY.

COSTS—Divorce — Practice — Wife's costs pendente lite—Provision by husband for wife's costs—Separate estate - 134
See PRACTICE.

—— Queen's proctor—Intervention - 161
See PRACTICE. 4.

CRUELTY — Husband's petition for divorce—Countercharges—Findings of adultery against respondent and co-respondent, and of cruelty against petitioner—Discretionary bar - - - 33
See PRACTICE. 3.

DAMAGES—Practice—Intervention—Assignee of petitioner's interest in the damages 247
See PRACTICE. 2.

DECREE NISI—Estoppel—Verdict followed by decree nisi—Rescission of decree nisi 25
See ESTOPPEL.

ESTOPPEL—*Verdict followed by Decree Nisi—Rescission of Decree Nisi for Collusion and Suppression of Material Facts.*] The verdict of the jury at the trial of a petition for divorce by a wife against her husband finding that the husband has been guilty of adultery and cruelty, and a decree nisi in accordance with such verdict, are conclusive evidence of such adultery and cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against his wife. And the mere fact that such decree nisi has been set aside by the Court upon the intervention of the Queen's Proctor, the

ESTOPPEL—*continued.*

grounds upon which it was set aside not affecting the propriety of the verdict, does not prevent the findings of the jury from being conclusive evidence in the second suit. BUTLER *v.* BUTLER [C. A. 25

EVIDENCE—Divorce—Admission of evidence of respondent against co-respondent — Right of co-respondent to cross-examine respondent - - - - 248
See PRACTICE. 5.

INFANT—Maintenance by father—Child above the age of sixteen—Jurisdiction—Divorce Division - - - 295
See CHILDREN, MAINTENANCE OF.

INTERVENTION—Divorce—Charge of adultery against petitioner—Motion by person with whom adultery charged—Refusal of leave to intervene—Jurisdiction 31
See PRACTICE. 6.

MAINTENANCE—Divorce — Alimony pendente lite—Jurisdiction—Suit for nullity of marriage - - - - 307
See ALIMONY. 2.

—— Divorce — Husband's petition — Countercharges—Findings of adultery against respondent and co-respondent, and of cruelty against petitioner—Petitioner to secure maintenance for respondent, to be payable dum sola et casta vixerit 33
See PRACTICE. 3.

—— Divorce—Income of respondent—Profits of partnership business - - 102
See ALIMONY. 3.

—— Divorce—Income of respondent—Profits of partnership business - - 315
See ALIMONY. 4.

—— Divorce—Order for permanent maintenance —Accord and satisfaction—Contract
See ALIMONY. [204

NEW TRIAL—Misdirection—Divorce—Practice
See PRACTICE. 5. [248

PRACTICE—*Costs—Wife's Costs pendente lite—Provision by Husband for Wife's Costs—Separate Estate—Rules of December* 26, 1865, *r.* 158.] On an application by a wife pendente lite in divorce proceedings, that her husband may be ordered to pay her costs already incurred, and give security for her future costs, the judge has a discretion to be exercised with regard to the whole circumstances of the case, and may take into account the relative incomes of the husband and wife, and is not bound to refuse the application because the wife has separate property the amount of which is much more than sufficient for payment of her costs. ALLEN *v.* ALLEN - C. A. 134

2. —— *Damages—Intervention—Assignee of Petitioner's Interest in the Damages.*] The peti-

PRACTICE—*continued.*

tioner in a divorce suit having recovered damages against the co-respondent, a person claiming to be the assignee of the petitioner's interest in the damages applied at chambers for leave to intervene:—*Held*, that the application must be refused. HUNT *v.* HUNT - - - 247

3. —— *Discretion — Husband's Petition — Countercharges — Findings of Adultery against Respondent and co-Respondent, and of Cruelty against Petitioner — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretionary Bar — Decree Nisi — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32 — *Petitioner to secure Maintenance for Respondent, to be payable dum sola et casta vixerit.*] Upon a petition by a husband for divorce on the ground of his wife's adultery, in which the respondent countercharged cruelty and adultery, the jury found that the respondent and co-respondent had committed adultery; that the petitioner had not committed adultery, but that he had been guilty of cruelty towards his wife. There was no finding as to whether the petitioner's cruelty had conduced to the respondent's adultery. —The Court, being of opinion that the adultery of the respondent with the co-respondent was not brought about by the petitioner's cruelty, exercised its discretion under the Matrimonial Causes Act, 1857, s. 31, by pronouncing a decree nisi, at the same time directing that the decree should not be made absolute unless the petitioner secured to his wife, by deed, an allowance of 36*l.* a year for her maintenance.—The Court further ordered that the deed should contain a clause, providing that the allowance to the wife should only be payable so long as she should remain chaste and unmarried. *Badham* v. *Badham and Gorst* (62 L. T. 663) followed.—*Lander* v. *Lander* ([1891] P. 161) distinguished. EDWARDS *v.* EDWARDS - - - - - 33

4. —— *Discretion—Wife's Petition—Adultery and Cruelty—Decree Nisi—Collusion and Condonation after Decree Nisi—Intervention—Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 7 — "*Material Facts not brought before the Court*"—*Pleadings—Adultery subsequent to Condonation—Revival—Rescission of Decree—Practice—Costs.*] A wife having obtained a decree nisi for the dissolution of her marriage upon the ground of adultery and cruelty, the Queen's Proctor intervened to shew cause why the decree should not be made absolute, alleging that the decree had been obtained by the suppression of material facts; that the petition had been prosecuted in collusion with the respondent; and, that, since the date of the decree, the petitioner had condoned the adultery and cruelty upon which the decree was based. The petitioner, after denying the allegations of the Queen's Proctor, pleaded that if she had condoned the acts of adultery and cruelty upon which the decree was founded, such condonation had been cancelled, and her right to complain of the said offences had been revived by acts of adultery committed by the respondent subsequently to such condonation. Upon findings of fact that there had been condonation since the decree nisi, and collusion to suppress the fact of such condonation, and that the respondent, after the said collusion and condonation had taken place, had committed adultery, the Court, in rescinding the decree and dismissing the petition:—*Held*, that the collusion to suppress the fact of condonation having taken place after decree nisi was a sufficient ground for refusing to make the decree absolute, and facts establishing such collusion were "material facts" within the terms of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, which the Queen's Proctor was right in bringing to the knowledge of the Court, inasmuch as, the decree nisi being only the inchoate part of the decree, and the suit not being completed until after decree absolute, the petition, although not presented, had been prosecuted in collusion: —*Held*, also, that such collusion might also be brought forward by the Queen's Proctor under the latter part of s. 7 of the Act of 1860, and formed ground for rescinding the decree nisi:— But, *held*, that where there has been adultery, which has been condoned by the petitioner, such condonation, if followed by other acts of adultery on the part of the respondent, forms no ground for rescinding the decree nisi. *Moore* v. *Moore* ([1892] P. 382) followed. ROGERS *v.* ROGERS 161

5. —— *Evidence—Admission of Evidence of Respondent against co-Respondent—Right of co-Respondent to Cross-examine Respondent—Misdirection—New Trial.*] The evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination.—Therefore, in a divorce suit, the evidence of the respondent is not admissible against a co-respondent if the judge refuses to allow the co-respondent to cross-examine upon it. —*Semble*, a right of cross-examination exists between a respondent and a co-respondent, and if cross-examination is permitted the evidence of either party is admissible against the other.— *Glennie* v. *Glennie* (3 Sw. & Tr. 109) doubted. ALLEN *v.* ALLEN - - - C. A. 248

6. —— *Jurisdiction—Wife's Petition—Decree Nisi—Queen's Proctor's Intervention—Leave to Queen's Proctor to add Charge of Adultery against Petitioner—Motion by Person with whom Adultery charged—Refusal of Leave to Intervene.*] Where a wife had obtained a decree nisi, dissolving her marriage on the ground of adultery and cruelty, and the Queen's Proctor intervened, alleging, in his plea, collusion, condonation, and suppression of material facts, leave was given to the Queen's Proctor, in the course of the trial, to add a charge of adultery which he alleged had been committed by the petitioner with one, L. E., who thereupon moved for leave to intervene and defend himself from the charge:—*Held* (following *Grieve* v. *Grieve*, [1893] P. 288), that there was no jurisdiction to permit such an intervention. CAREW *v.* CAREW - - - - - 31

—— Settlements, variation of - - 172
See SETTLEMENTS, VARIATION OF

QUEEN'S PROCTOR — Intervention—"Material facts not brought before the Court" 161
See PRACTICE. 4.

QUEEN'S PROCTOR—*continued.*

—— Intervention—Practice—Wife's petition—Leave to Queen's Proctor to add charge of adultery against petitioner—Motion by person with whom adultery charged—Refusal of leave to intervene—Jurisdiction - - - - 31
See PRACTICE. 6.

SETTLEMENTS, VARIATION OF—*Wife's Power of Appointment upon Second Marriage—22 & 23 Vict. c.* 61, *s.* 5.] Where a marriage settlement gives the wife, upon the death of the husband, a power of appointment in favour of a second husband and the children of a second marriage, the Court will not, upon the dissolution of the marriage through the misconduct of the husband, vary the settlement so as to enable the wife to exercise such power of appointment before his death. POLLARD *v.* POLLARD - - 172

STATUTES:

20 & 21 Vict. c. 85, s. 31 - - - 33
See PRACTICE. 3.

—— —— s. 32 - - - 102, 315
See ALIMONY. 3, 4.

STATUTES—*continued.*

20 & 21 Vict. c. 85, s. 35 - - - 295
See CHILDREN, MAINTENANCE OF.

22 & 23 Vict. c. 61, s. 4 - - - 295
See CHILDREN, MAINTENANCE OF.

—— —— s. 5 - - - - 172
See SETTLEMENTS, VARIATION OF.

23 & 24 Vict. c. 144, s. 7 - - - 161
See PRACTICE. 4.

29 & 30 Vict. c. 32 - - - 204
See ALIMONY.

—— —— s. 1 - - - 102, 315
See ALIMONY. 3, 4.

VERDICT—Estoppel—Verdict followed by decree nisi—Rescission of decree nisi 25
See ESTOPPEL.

WORDS:

—— "Material facts not brought before the Court" - - - - 161
See PRACTICE. 4.

ADMIRALTY.

BILL OF LADING—Damage to cargo—Perils of the sea—Negligence—Onus of proof
See SHIP. 3. [226

CASES—*Forbes* v. *Aspinall* (13 East, 323) distinguished - - - - 320
See INSURANCE (MARINE). 4.

—— *Zantho, The* (12 App. Cas. 503) explained
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CHARTERPARTY—Disbursements at port of loading—Advance on account of freight
See SHIP. 2. [128

—— Foreign law—Construction of written document - - - - - 58
See SHIP.

—— Insurance, marine—Chartered freight—Delay through breakdown of machinery
See INSURANCE (MARINE). [1

COLLISION—*Narrow Channel—Starboard Side Rule—Regulations for Preventing Collisions at Sea,* 1884, *art.* 21.] The plaintiffs' steamship, bound inwards, and the defendants' steamship, bound outwards, came into collision at night in the estuary of the Thames, a little above the Swin Middle Lightship, and a little to the westward of the direct course from that lightship to the East Maplin Buoy:—*Held,* by the Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), that the defendants' vessel was to blame, inter alia, for being on the wrong side of the channel, as, in navigating the passage known as the Swin, between the Middle Lightship and the Middle Sands, every steamship must, when it is safe and practicable, keep to that side of the fairway which is on her starboard hand, the passage being a narrow channel within

COLLISION—*continued.*

the meaning of article 21 of the Regulations of 1884 for Preventing Collisions at Sea. THE MINNIE - - - - - C. A. 336

2. —— *Tug and Tow—Tug in Collision with third Vessel—Contributory Negligence of third Vessel—Joint Tortfeasors—Liability of Tow—Measure of Damages.*] A tug, whilst towing a vessel, came into collision with, and sank, a third vessel, and was herself damaged. The third vessel and the tug were found to blame for excessive speed in fog. The tow was also found to blame for not controlling the speed of the tug. On these facts:—*Held,* by the President (Sir F. H. Jeune), that although the tow had not been herself in collision, and therefore her liability to the third vessel depended on the relationship of master and servant between herself and the tug, still the Admiralty rule in the case of collision between ships applied, and the owners of the tug and the owners of the tow were liable for half the damages of the third vessel after deducting half the damages of the tug for which the owners of the third vessel were liable. THE ENGLISHMAN AND THE AUSTRALIA - - 239

CONCEALMENT—Insurance, marine—Non-communication of material fact—Slip—Description of charterparty - - 1
See INSURANCE (MARINE).

CO-OWNER—Ship—Repairs—Powers of managing owner - - - - 214
See SHIP. 6.

DAMAGES—Measure of—Collision—Tug and tow—Tug in collision with third vessel
See COLLISION. 2. [239

DECREE—Admiralty—Salvage—Application to vary decree - - - - - 330
See PRACTICE. 2.

EVIDENCE—Onus of proof—Bill of lading—Perils of the sea—Negligence - 226
See SHIP. 3.

FOREIGN LAW—Insurance, marine—Stranding—General average payable per foreign statement—Negligence clause - 108
See INSURANCE (MARINE). 5.

—— Ship—Charterparty—Construction of written document - - - - 58
See SHIP.

FREIGHT—Advance on account of freight—Disbursements at port of loading—Right of deduction from freight - - 128
See SHIP. 2.

—— Insurance, marine—Charterparty—Chartered freight—Delay through breakdown of machinery - - - - 1
See INSURANCE (MARINE). 4.

—— Insurance, marine—Valued policy - 320
See INSURANCE (MARINE).

GENERAL AVERAGE—Foreign statement—Negligence clause - - - 108
See INSURANCE (MARINE). 5.

INSURANCE (MARINE)—*Charterparty—Chartered Freight—Perils of the Sea—Delay through Breakdown of Machinery—Causa proxima—Non-communication of material Fact.*] By a charterparty the charterer agreed to pay the plaintiffs so much monthly in advance for the hire of their vessel, for the space of one voyage to South America and back to Europe, provided that "in the event of loss of time by . . . . breakdown of engines or machinery . . . . and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."—By a slip initialled by the defendant the risk to be covered by insurance was described as "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered on board or not on board" for three months, "one-third diminishing each month."—By a policy executed in accordance with the slip the perils against which the defendant undertook to indemnify the plaintiffs were "of the seas," &c., in the usual form.—The plaintiffs' vessel sailed under the above charter, and before the three months expired, owing to the thrust-shaft parting, she had to be towed into St. Vincent. Payment of hire consequently ceased during the twenty-eight days' delay caused by the accident.—In an action brought by the plaintiffs on the policy to recover the amount so lost, Gorell Barnes, J., found as a fact that the damage to the thrust-shaft was caused by sea perils, and:—*Held*, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), affirming the decision of Gorell Barnes, J., that the defendant was liable, as (following and approving *The Alps* [1893] P. 109) the clause in the charterparty was put

INSURANCE (MARINE)—*continued.*
into operation through the immediate action of the perils insured against; secondly, that though the plaintiffs might ultimately earn the whole amount of freight, the loss due to the postponement through the delay fell on the policy; thirdly, that though the defendant was not told at the time of initialling the slip, that he was insuring freight under a time charter, containing the twenty-four hours' clause, this did not amount to non-communication of a material fact, as this cesser clause is practically universal in a time charter, and the description on the slip, "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered," coupled with the clause "one-third diminishing each month," was sufficient to give the defendant notice of the nature of the risk. THE BEDOUIN - C. A. 1

2. —— *Collision Clause—Construction of Proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers."*] The plaintiffs' steamship came into collision in the river Scheldt in Belgium with another British steamship, and in consequence the latter sank.—The Belgian authorities gave the owners of the sunken vessel notice to remove the obstruction, and, on failure to comply, the Belgian authorities removed it, and charged the owners of the sunken vessel with the cost, which they paid.—A moiety of this sum was paid by the plaintiffs to the owners of the sunken vessel, after a reference in the Admiralty registry, which followed an admission that both vessels were to blame by the owners of the respective vessels.—To recover a due proportion of this moiety, so paid to the owners of the sunken vessel, the plaintiffs sued the defendants, their underwriters on ship, under the following collision clause in the policy of insurance: "and it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured we" (the defendants) "will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured." . . . "*Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers . . . . consequent on such collision. . . .*"—*Held*, by the Court of Appeal (Lindley, A. L. Smith, and Davey, L.JJ.), reversing the decision of Gorell Barnes, J., that the defendants were not liable, as the proviso exempted them from indemnifying the plaintiffs for payments made directly or indirectly for removal of obstructions under statutory powers. THE NORTH BRITAIN - - - C. A. 77

3. —— *Fire, Loss by—Memorandum in Lloyd's Policy—"Free from average under 3 per cent., unless general, or the Ship be . . . . burnt."*] A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds

INSURANCE (MARINE)—*continued.*

per cent., unless general, or the ship be stranded, sunk or burnt"—unless the injury by fire is such as to constitute a substantial burning of the ship as a whole. THE GLENLIVET - C. A. 48

4. —— *Freight—Valued Policy.*] The plaintiffs, whilst their vessel was on her way to New Orleans, and in anticipation of a full homeward cargo, effected a policy of insurance with the defendants for 1500*l.* upon "freight valued at 5500*l.*" "at and from New Orleans to Liverpool," the insurance to commence from the loading of the cargo.—At the date of the policy this valuation was reasonable and proper upon a full cargo, having regard to the rates of freight then current at New Orleans and to the engagements of cargo for the vessel; but on her way out she met with an accident, and during the time occupied in repairs the rates of freight at New Orleans declined considerably, and the greater part of the engagements of cargo had to be cancelled. After some months' delay the vessel sailed for Liverpool with a full cargo, the total freight on which amounted to 3250*l.*, of which 952*l.* was paid in advance. In the course of the voyage the vessel was lost by a peril insured against, and the total freight at risk, 2298*l.*, also lost. The plaintiffs collected under other policies the sum of 3250*l.*, and in an action against the defendants claimed 1500*l.* from them.—The defendants contended that the valuation must be opened, and that, on the actual amount of freight at risk, the plaintiffs had been fully indemnified under other policies:—*Held*, by Gorell Barnes, J., that the valuation was binding; but as freight to the amount of 952*l.* had been paid in advance, and was, therefore, not at risk, the valuation of 5500*l.* must be reduced by 1611*l.*, being the proportion of the prepaid freight to the gross freight, leaving 3889*l.* as the value at risk, and as, of this sum, the plaintiffs had received 3250*l.*, the amount recoverable from the defendants was 639*l.* with a small proportionate return of premium.—*Forbes* v. *Aspinall* (13 East, 323), distinguished. THE MAIN - - - - - - 320

5. —— *Freight, Policy on—Policy on Ship—Stranding—General Average payable per Foreign Statement—Costs of Discharging, Warehousing, and Reshipping Cargo—Suing and Labouring Clause—Bill of Lading—Negligence Clause—Dutch Law.*] The plaintiffs effected with the defendants two policies of insurance, one on the hull and machinery of their vessel and the other on freight. Under both policies general average was payable as per foreign statement, if in accordance with the contract of affreightment. The policy on ship specially covered loss or damage through the negligence of the master, and both policies incorporated the ordinary suing and labouring clause.—The plaintiffs' vessel whilst carrying a cargo of grain from Nicolaieff to Rotterdam—under bills of lading which excepted strandings, even when occasioned by the negligence of the master—stranded on a reef off Malta. To get the vessel off, a portion of the cargo had to be discharged into lighters, taken to Valetta, and warehoused. The vessel was then towed to Valetta, and, to enable her to be placed in the pontoon dock, the remainder of the

INSURANCE (MARINE)—*continued.*

cargo was discharged and warehoused.—On the completion of the repairs the two portions of cargo were reshipped, and the vessel sailed for Rotterdam, where, after the cargo was delivered, an average statement was prepared shewing, according to the law and practice in Holland, the amount of general average sacrifices and expenses, and the proportions due from ship, cargo, and freight.—The defendants, as underwriters on ship and freight, paid their proportion; but, on suing the consignees of cargo in the Dutch Courts, the plaintiffs failed to recover from them their proportion, on the ground that—notwithstanding the negligence clause in the bill of lading—as the stranding was attributable to the negligent navigation of the master, there was no liability on the part of the cargo owners to contribute in general average.—The plaintiffs thereupon sued the defendants, upon the policy on ship, to recover the portion, debited per foreign statement to cargo, of expenses incurred in relation to the refloating of the vessel, the subsequent towage into, and the discharge at, Malta, and, under the suing and labouring clause in the policy on freight, for the portion, debited per foreign statement to cargo, of expenses incurred in warehousing and reshipping cargo:—*Held*, by the Court of Appeal (Lindley, A. L. Smith, and Davey, L.JJ.), affirming the decision of Gorell Barnes, J., that the defendants were not liable, as the foreign adjustment was conclusive as to what were general average expenses, and as to the apportionment of those expenses, so that the plaintiffs could not, as against the defendants, select out of those expenses certain items and claim them on the ground that, according to English law, they would be charged as particular average on ship, or as being particular charges recoverable under the suing and labouring clause. THE MARY THOMAS - - - - C. A. 108

6. —— *Principal and Agent—Breach of Contract—Indemnity—Duty of Agent effecting Policy.*] The plaintiffs, barge owners, hired the defendant's tug on the terms of indemnifying the defendant against all loss, damage, expenses or costs to which the defendant might be put by reason of collision or otherwise in connection with the tug, and the defendant undertook to keep the tug fully insured against all risks, including collision risk and damage to or by craft in tow of the tug or such craft colliding with others, and to indemnify the plaintiffs in respect of such damage to the extent of the moneys received by him under the insurance.—The defendant effected policies of insurance to cover the specified risks to the extent of 2000*l.* on an admitted valuation of the tug of 2800*l.*—A barge of the plaintiffs, whilst (it was alleged) in tow of the defendant's tug, came into collision with, and damaged, a steamer. The owners of the steamer sued the plaintiffs, who admitted liability, and, on the reference, the damages were assessed at 335*l.* 10*s.*, which sum was increased to 458*l.* 19*s.* 7*d.* by interest, the costs of the reference, and the costs incurred by the plaintiffs in the proceedings against them.—The defendant sent in the plaintiffs' claim to the underwriters, and, on their refusal to pay, offered to hand over

INSURANCE (MARINE)—*continued.*
the policies to the plaintiffs; but the plaintiffs required the defendant to sue the underwriters, and, in default, to pay the plaintiffs the above amount by way of damages for breach of contract. The defendant denied liability beyond the proportion of the claim for the damage on the uninsured value of the tug, and in respect of this liability paid 165*l.* 1*s.* into court:—*Held*, by Bruce, J., that the defendant was entitled to judgment, as he had not broken his contract, and was not bound, without an indemnity, to take legal proceedings, at his own cost and risk, against the underwriters. WILLIAMS TORREY & CO. *v.* KNIGHT. THE LORD OF THE ISLES 342

JOINT TORTFEASORS—Tug and tow—Tug in collision with third vessel—Contributory negligence of third vessel—Liability of tow—Measure of damages - 239
See COLLISION. 2.

JURISDICTION — *Personal Injuries—Action in rem—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7—"*Damage done by any Ship.*"] By s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."—The plaintiff issued a writ in rem, and arrested a vessel, claiming damages for personal injuries sustained through falling down into the hold of that vessel, owing to the hatchway being only covered with a tarpaulin at the time that he was crossing to his own ship, which was moored outside the first mentioned vessel in the Regent's Canal Dock.—On motion to set aside the writ for want of jurisdiction:—*Held*, by Bruce, J., that the action must be dismissed, for, though the word "damage" included personal injury, the damage was not "done by any ship" within the meaning of the Act. THE THETA [280

LIEN—Ship—Liabilities incurred by master—Maritime lien—Priorities - 271
See SHIP. 4.

MORTGAGE — Sale of ship by mortgagee — Purchaser with notice of employment of ship—Certificate of registry—Order for delivery - - - - 175
See SHIP. 5.

—— Ship — Liabilities incurred by master — Maritime lien—Priorities - 271
See SHIP. 4.

NECESSARIES, ACTION FOR —Foreign ship—Insufficient proceeds—Priorities 141
See PRACTICE.

NEGLIGENCE—Admiralty—Personal injuries—Action in rem—"Damage done by any ship" - - - - 280
See JURISDICTION.

—— Bill of lading—Perils of the sea—Negligence—Onus of proof - - 226
See SHIP. 3.

PRACTICE—*Foreign Ship — Actions for Necessaries—Insufficient Proceeds — Priorities.*] The plaintiffs instituted in the High Court an action in rem for necessaries against the owners of a foreign steamship, and arrested the vessel the same day.—Three other actions for necessaries were subsequently commenced against the owners of the same vessel in a county court, and, after judgment in these actions had been obtained by consent, the plaintiffs obtained judgment by default for the amount of their claim, with interest and costs, but without prejudice to other claims against the vessel, and reserving all questions as to priorities.—The vessel was sold, with the consent of the plaintiffs, in a wages action, which admittedly had priority, the proceeds paid into court, the three county court actions transferred to the High Court, and the question of priorities referred to the registrar.—The plaintiffs, in respect of the balance of the proceeds, which was insufficient to meet all the claims, and as against the other necessaries actions, claimed priority on the ground that they held security by reason of the relation back of their judgment to the date of the institution of the action and of the arrest:—*Held*, by the President (Sir F. H. Jeune), confirming the report of the registrar, that the claimants in the necessaries actions were entitled to be paid out of the balance of the proceeds pro ratâ, for, in such cases, the Court holds the property, not only for the first plaintiff, but also for, at least, all creditors of the same class, who assert their claims before any unconditional decree is pronounced.—*Semble*, a decree in unconditional terms would, so long as the funds remained in the hands of the Court, be modified so as to let in others, who, without laches, put forward claims of a like character. THE AFRICANO - 141

2. —— *Salvage — Appraisement — Awards to Salvors absorbing whole Proceeds—Application to vary Decree.*] In an action of salvage the plaintiffs obtained an award of 1500*l.* upon an appraised value of the defendants' ship of 1250*l.*, and of her cargo of 5004*l.*: total, 6254*l.*—The ship was subsequently sold by the marshal for 713*l.*, the cargo, which was of a nature not readily saleable in this country, for 1649*l.*, and the total 2362*l.* was reduced by fees and disbursements to 1625*l.* An award of 130*l.* obtained by the pilot and 100*l.* by boatmen in separate actions in respect of the same salvage operations brought the total salvage claims up to 1730*l.*, which more than absorbed the whole proceeds.—On motion by the defendants to vary the decree by reducing the award of 1500*l.*:—*Held*, by Bruce, J., that the application must be refused, as the defendants had allowed the Court to proceed to award salvage upon the basis of the appraisement without taking any exception at the time, and, beyond the difference between the appraised value and the sum realized by the sale, there was nothing to indicate that the appraisement did not fairly represent the value at the time and place when the property was brought into safety. THE GEORG - - - - - 330

3. —— *Tender—Amount paid into Court exceeding Amount found due—Order* XXII., r. 1–5.] In an action of damage by collision the defendants

PRACTICE—*continued.*
admitted their liability, and agreed to pay a certain percentage of the plaintiffs' proved, or agreed, damages and taxed costs. The parties being unable to agree as to the amount of the damages, the question was, by consent, referred to the registrar and merchants. Before the hearing of the reference the defendants tendered and paid into court 750*l.* in satisfaction of the claim. The plaintiffs did not accept the amount tendered, and the reference proceeded. The registrar, by his report, found that, at the agreed percentage, the sum due from the defendants was 713*l.* 16*s.*, with interest at 4 per cent. to the date of tender.—The plaintiffs applied under Order xxii., r. 5, of the Rules of the Supreme Court for payment out to them of the amount tendered, viz., 750*l.*:—*Held*, by Bruce, J., that the plaintiffs were only entitled to the amount found due, viz., 713*l.* 16*s.*, with interest, as—except the rules expressly dealing with the mode of payment of money into and out of court in Admiralty actions—the provisions of Order xxii. do not affect the Admiralty practice relating to tender. THE MONA - - - - 265

PRINCIPAL AND AGENT—Marine insurance—Breach of contract—Indemnity—Duty of agent effecting policy - - 342
See INSURANCE (MARINE). 6.

PRIORITY — Actions for necessaries—Foreign ship—Insufficient proceeds - 141
See PRACTICE.

REPAIRS—Ship—Powers of managing owner—Liability of co-owners - - 214
See SHIP. 6.

RULES:
—— Order xxii., rr. 1–5 - - - 265
See PRACTICE. 3.

SAILING RULES—Starboard Side Rule - 336
See COLLISION.

SALVAGE — Appraisement—Awards to salvors absorbing whole proceeds—Application to vary decree - - - 330
See PRACTICE. 2.

SHIP — *Charterparty — Construction of Written Document—Carriage of Goods—Sale at Port of Distress—Freight—German Law.*] By a charterparty, on an ordinary English printed form, negotiated and made in London between the London broker of the plaintiff, a German shipowner domiciled in Germany, and the defendants, merchants in London, it was agreed that the plaintiffs' ship, which was under German colours, with a German master, and then in a French port, should proceed to Akyab, Rangoon or Bassein, according to orders, and there load, from the defendants' agents, a cargo of rice, and being so loaded proceed to Scilly, Falmouth, Plymouth, or Cowes, for orders to discharge in the United Kingdom or on the Continent between Havre and Hamburg, "freight being payable at and after the rate of 35*s.* sterling per ton of 20 cwt. net delivered. . . . The Act of God, the Queen's Enemies, Restraints of Princes and Rulers, Fire, and all and every other Dangers and Accidents of the Seas, Rivers and Navigation of whatever nature and kind soever, during the said Voyage, always excepted . . . The freight to be paid on right delivery of cargo if discharged in the United Kingdom; in cash as customary . . . and if on the Continent, in cash at the exchange of the day of final discharge without discount."—The vessel proceeded to Bassein, and there loaded a cargo of rice belonging to the defendants, the master signing a bill of lading making the rice deliverable to the defendants' order, freight and all other conditions as per charterparty. On the voyage the vessel met with heavy weather, and her master, for the safety of ship and cargo, put into Port Elizabeth, where a portion of the cargo was found to be so much damaged by sea-water that, on survey, it was condemned as unfit for reshipment and sold by the master.—The plaintiff sued the defendants for full freight on the portion of the cargo so sold at the port of distress:—*Held*, by Gorell Barnes, J., that the defendants were liable, as the parties must be taken to have intended that the law of the flag should apply to the contract and—in the absence of any express provision in the charterparty dealing with the circumstances which had arisen—German law supplemented the contract, and made full freight payable on the portion of the cargo so sold:—*Held*, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reversing the decision of Gorell Barnes, J., that the defendants were not liable, as the intention of the parties was to make an English contract, and, the payment of freight being expressly dealt with in the charterparty, none was payable on the portion of the cargo sold in the port of distress. THE INDUSTRIE - - - C. A. 58

2. —— *Charterparty—Disbursements at Port of Loading—Advance on Account of Freight.*] The plaintiffs' steamer was, on two occasions, chartered by the defendants for the homeward voyage from a Spanish port to Liverpool. The charterparties provided for the payment of certain lump sum freights, and both contained the following clause: "Cash for steamer's ordinary disbursements at port or ports of loading; not exceeding 150*l.* in all, to be advanced at exchange of 50*d.* to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight, on right and true delivery of the cargo, in cash."—On the first voyage the master, having part of his outward freight in hand, partly disbursed the vessel therewith, and the defendants advanced cash for the balance, amounting at the stipulated rate of exchange to 90*l.* 16*s.* 6*d.*—On the second voyage the master, having a sufficient balance of his outward freight, fully disbursed the vessel to an amount exceeding 150*l.*, and did not obtain any advance freight from the defendants.—The defendants deducted from the freight, due to the plaintiffs on the delivery of the homeward cargo on the first voyage, the profit they would have made by the difference of exchange on the amount required to make up 150*l.*, and, on the second voyage, the profit which they would have made by the difference of exchange on the whole 150*l.*,

SHIP—*continued.*

if they had advanced that sum on account of freight at the loading port.—In an action by the plaintiffs against the defendants for balance of freight so deducted:—*Held*, by Gorell Barnes, J., that the plaintiffs were entitled to succeed as the clause was optional, not obligatory, on the plaintiffs, so that if they provided their master with money to disburse the ship, he was not bound to apply to the defendants for cash up to the limited amount by way of advance freight. THE PRIMULA [128

3. —— *Damage to Cargo—Bill of Lading—Breach of Contract—Perils of the Sea—Negligence—Onus of Proof—New Trial.*] The plaintiffs brought an action against the defendants for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea; but the President (Sir F. H. Jeune) ruled that in order to excuse themselves for the damage to the goods it lay on the defendants to shew, not only a peril of the sea, but a peril of the sea not occasioned by their negligence.—*Held*, by the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.JJ.), that as the loss apparently fell within the exception, the burden of shewing that the defendants were not entitled to the benefit of the exception, by reason of negligence, lay upon the plaintiffs.—The observations of Lord Herschell in *The Xantho* (12 App. Cas. 503, at p. 512) explained. THE GLENDARROCH - - - - C. A. 226

4. —— *Maritime Lien—Liabilities incurred by Master—Bill of Exchange—Priorities—Mortgagees—Merchant Shipping Act*, 1889 (52 & 53 *Vict. c.* 46), *s.* 1.] By s. 1 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46): "Every master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages . . ."—The defendants, shipowners in London, contracted with a coal merchant for the supply of bunker coal to their vessel, then lying in the port of London, and about to sail on a voyage to the Mediterranean. As part of the contract payment was to be made by bill of exchange drawn by the master on the defendants in favour of the coal merchant. The bill so drawn by the master was accepted by the defendants, but dishonoured at maturity; and thereupon the master, as plaintiff, issued a writ in rem, and arrested the vessel, claiming the amount of the bill, notarial charges, interest, and the costs of the action against him as drawer. The defendants did not appear, but on the intervention of prior mortgagees of the vessel:—*Held*, by the President (Sir F. H. Jeune), first, that by the Act of 1889 a lien is conferred in respect of those disbursements only in the case of which it was supposed to have been created by the Admiralty Court Act of 1861. Secondly, that the test of the disbursements or liabilities of the master, in

SHIP—*continued.*

respect of which a lien is given by the Act of 1889, is whether they are such as would, without express authority, have pledged the owners' credit. Thirdly, that in the above view there was no lien created to the prejudice of the interveners, and they were therefore entitled to judgment. THE ORIENTA - - - 271

5. —— *Mortgage—Sale of Ship by Mortgagee—Purchaser with Notice of Employment of Ship—Certificate of Registry—Order for Delivery—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 50.] A shipowner, whilst a steamer was being built for him, entered into an agreement with the defendants by which he undertook to fit her for a particular trade and run her for five years as one of the defendants' line.—After the completion and registration of the vessel her owner mortgaged her. Subsequently the plaintiff became second mortgagee, and, after the vessel had been running upwards of two years in the defendants' line and was temporarily laid up, her owner died, having made default in payment of instalments under the first mortgage.—The first mortgagees, who were without notice of the agreement with the defendants, thereupon took possession of the vessel and sold her to the plaintiff, who, at the date of his second mortgage, had notice of the existence of the agreement, and, at the date of his purchase, notice of the contents.—The plaintiff having entered into a contract for the sale of the ship to third parties, claimed, for purposes of navigation, under s. 50 of the Merchant Shipping Act, 1854, the delivery up of the certificate of registry which was in the hands of the defendants. The defendants denied the plaintiff's right to the certificate except on condition that the plaintiff should be restrained from dealing with the ship in derogation of the agreement:—*Held*, by Gorell Barnes, J., that the plaintiff was entitled to an order for the delivery up of the certificate, and that he was not bound by the agreement between the late owner and the defendants, for otherwise the power of sale of the first mortgagees as vendors would be restricted. THE CELTIC KING 175

6. —— *Repairs—Powers of Managing Owner—Liability of Co-owners.*] The authority of the managing owner of a vessel extends to the conduct on shore of all that concerns the employment of the ship, so that co-owners in deputing to him the management of the vessel on their behalf thereby give him power to pledge their credit for what is necessary to repair her, so as to enable her to be employed in the ordinary course of trade suitable for the vessel, and it makes no difference in the liability of the co-owners that the managing owner has instructions to insure and has, in fact, collected the money from the underwriters to discharge a claim for heavy repairs consequent on damage sustained by the vessel. THE HUNTSMAN - - - - - - 214

—— Action for necessaries—Insufficient proceeds—Priorities - - - - 141
See PRACTICE.

—— Insurance, marine—Collision clause 77
See INSURANCE (MARINE). 2.

SHIP—*continued.*

—— Insurance, marine—Loss by fire—Ship when "burnt" within the meaning of the policy - - - - 48
See INSURANCE (MARINE). 3.

—— Insurance, marine — Stranding — General average payable per foreign statement —Negligence clause - - 108
See INSURANCE (MARINE). 5.

STATUTES:—

17 & 18 Vict. c. 104, s. 50 - - 175
See SHIP. 5.

24 Vict. c. 10, s. 7 - - - 280
See JURISDICTION.

STATUTES—*continued.*

52 & 53 Vict. c. 46, s. 1 - - - 271
See SHIP. 4.

TENDER—Admiralty—Practice—Amount paid into court exceeding amount found due
See PRACTICE. 3. [265

WORDS:—

"Damage done by any ship" - - 280
See JURISDICTION.

"Free from average under 3 per cent., unless general, or the ship be . . . burnt" 48
See INSURANCE (MARINE). 3.

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